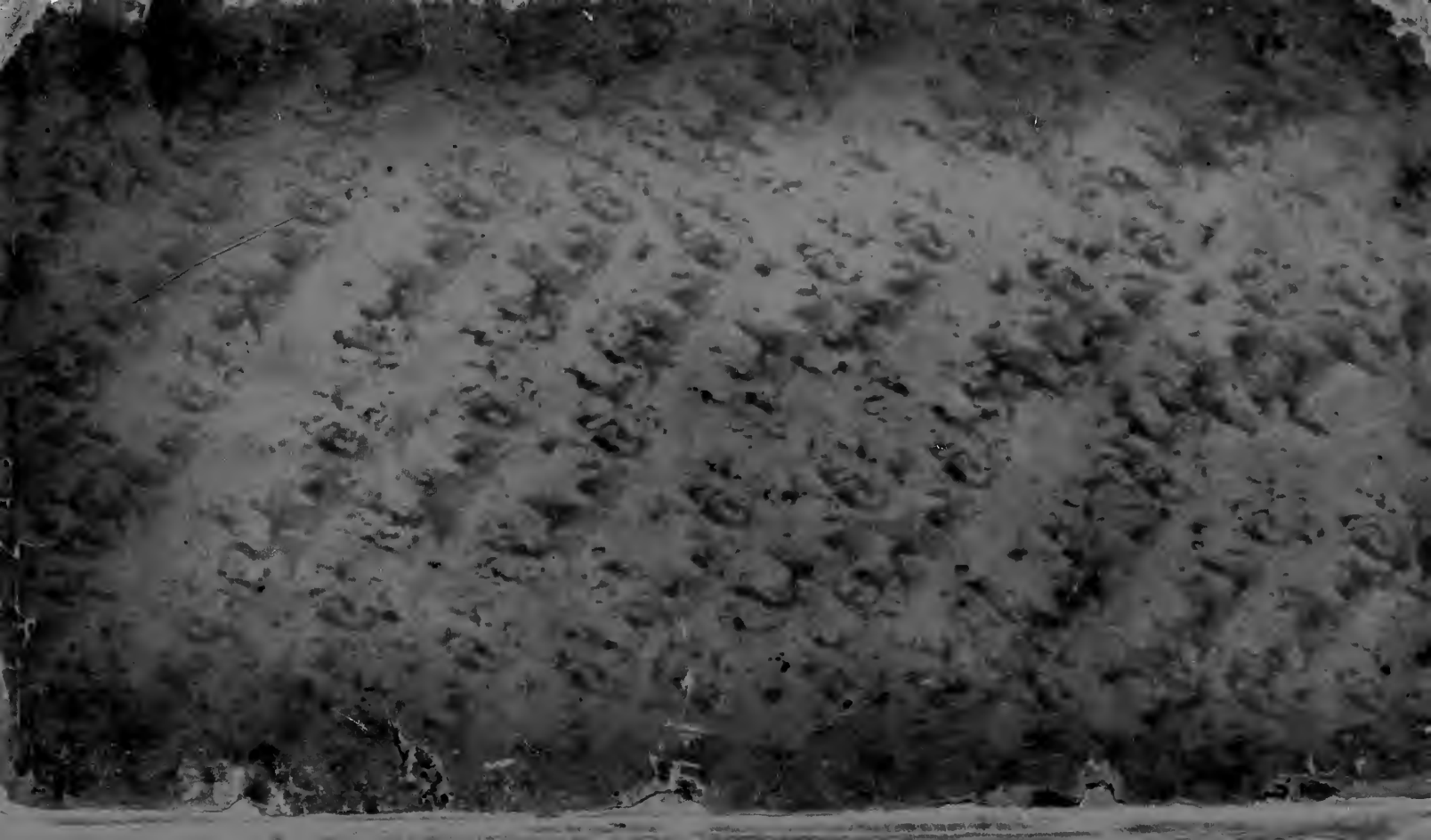

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John Adams

ESSAYS

UPON

SEVERAL SUBJECTS

CONCERNING

BRITISH ANTIQUITIES;

VIZ.

I. INTRODUCTION OF THE FEUDAL LAW INTO SCOTLAND.

II. CONSTITUTION OF PARLIAMENT.

III. HONOUR. DIGNITY.

IV. SUCCESSION OR DESCENT.

With an APPENDIX, upon HEREDITARY AND INDEFEASIBLE RIGHT.

Compoſed *anno* MDCCXLV.

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With ADDITIONS and ALTERATIONS.

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MDCCLXIII.

INTRODUCTION.

TO our late troubles the public is indebted for the following papers, if they be of value to create a debt. After many diſconſolate hours, the author took courage to think of ſome ſtudy, that might, in ſome meaſure, relieve his diſtreſſed mind. A connection with the cauſe of our violent and unhappy diſſenſions, led him naturally to the following ſpeculations, which he now gives to the public; anxiouſly wiſhing to raiſe a ſpirit in his countrymen, of ſearching into their antiquities, thoſe eſpecially which regard the law and the conſtitution; being ſeriouſly convinced, that nothing will more contribute than this ſtudy, to eradicate a ſet of political opinions, which, tending to break the peace of the ſociety, have been pernicious

pernicious to this iſland. If theſe papers have the effect intended, it is well: if not, they may at leaſt ſerve to bear teſtimony of ſome degree of firmneſs in the author, who, amidſt the calamities of a civil war, gave not his country for loſt; but, truſting to a good cauſe, and to the prevalence of good ſenſe among his countrymen, was able to compoſe his mind to ſtudy, and to deal in ſpeculations, which are not commonly reliſhed, but in times of the greateſt tranquillity.

Edinburgh,
Nov. 10. 1746.

HENRY HOME.

ESSAYS

ESSAYS

CONCERNING

BRITISH ANTIQUITIES.

ESSAY I.

OF THE INTRODUCTION OF THE FEUDAL LAW INTO SCOTLAND.

THE introduction of the Feudal law into Scotland is an event, which makes not ſuch a figure in our hiſtory as it ought to do: it is mentioned indeed by moſt of our hiſtorians; but drily, and curſorily, as if it were an ordinary incident. And yet, according to the account given of it, it appears to be a ſingular revolution, for which no adequate cauſe is aſſigned If credit can be given to hiſtory or tradition, we were once a free people; nay, we are reported to have been fierce

and untamed, our nobles of great power, and generally too mighty for the ſovereign. Now, as it is the plan of the Feudal law, to beſtow the whole land-property upon the king, and to ſubject to him the bulk of the people, in quality of ſervants and vaſſals; a conſtitution ſo contradictory to all the principles which govern mankind, can never be brought about, one ſhould imagine, but by foreign conqueſt, or native uſurpation. Yet neither of theſe cauſes is aſſigned by our authors, nor will the hiſtory of Scotland admit of ſuch ſuppoſitions: for no period can be aſſigned, during which the Feudal law might have been introduced, where there are any traces of conqueſt, or of military power, ſufficient to inforce ſo unnatural a conſtitution.

All our hiſtorians are agreed, that this revolution happened in the reign of Malcolm II.; and they are alſo pretty much agreed about the cauſe. This king had been engaged in a fierce war with the Danes, which, after various fortune, ended in the expulſion of the invaders. Many of the nobles

nobles having, upon this occaſion, exerted ſingular fidelity and valour, the king, it is ſaid, divided the crown-lands among them. And the following particular circumſtance is added, That the king retained no land to himſelf, but the Mute-hill in the town of Scoon. A very extenſive and unprecedented liberality! But what follows is ſtill leſs credible, *viz.* That the lords, to teſtify their gratitude, gave and granted to their ſovereign, and to his heirs for ever, the ward and relief of their lands, with the marriage of their heirs. This is in effect ſaying, That the lords ſubmitted their lands to the Feudal yoke; or, in other words, That all the lands in Scotland were ſurrendered to the king as his property; that all the great men came under perſonal obligations to be his ſervants and vaſſals, holding only the poſſeſſion of the lands, which they had ſurrendered, for ſuſtenance of themſelves and their people, ready upon all occaſions to fight his battles; for ſo much is implied in the Feudal ſyſtem. No returns of gratitude are too great for ſome individuals; but ſuch returns from a whole nation, without

exception, are far beyond the reach of belief. I ſhould be ſhocked at ſuch liberty of fiction in a romance. Therefore, as the foregoing account of the matter is utterly improbable, the deſign of this eſſay is, to collect ſome circumſtances whence probable conjectures may be formed, at what time, and by what means, the Feudal law was introduced into Scotland. I ſhall firſt endeavour to ſettle the time of introduction, as it may give light to the other branch of the diſquiſition; and, notwithſtanding the concurring teſtimonies of all our hiſtorians, I cannot help doubting, whether the Feudal law was introduced into Scotland ſo early as the reign of Malcolm II. What to me brought this point firſt under ſuſpicion, is a fact that can be made extremely evident. When one dives into the antiquities of this iſland, it will appear, that we borrowed all our laws and cuſtoms from the Engliſh. No ſooner is a ſtatute enacted in England, but, upon the firſt opportunity, it is introduced into Scotland; and accordingly our oldeſt ſtatutes are mere copies of theirs. Let the *Magna Charta* be put into the hands of any Scotchman,

Scotchman, ignorant of its hiſtory, and he will have no doubt that he is reading a collection of Scotch ſtatutes or regulations. Now, it is a point ſettled among the beſt Engliſh antiquaries, that the Feudal law was introduced into England by William the Conqueror. This is made evident by the accurate Spelman, and by our countryman Craig. From theſe two facts, a ſtrong preſumption ariſes, that the Feudal law made its progreſs from England to this country. And this preſumption receives additional force, when it is conſidered, that if we had the Feudal law before it came into England, it muſt have been derived from ſome people other than the Normans, with whom we had no intercourſe. Upon that ſuppoſition, we muſt expect to find the Feudal cuſtoms in Scotland, after the days of William the Conqueror, differing from what they were in England; as the Feudal cuſtoms varied much in different nations. What we had in Scotland, muſt have been thoſe of the country from which they were borrowed, perhaps a little varied in our practice. Yet upon inquiry, we find no ſuch difference as

we ought to expect from the ſuppoſition. On the contrary, it may with aſſurance be pronounced, that the Feudal cuſtoms in England and Scotland were preciſely the ſame, for a century or two after the days of William the Conqueror. This congruity betwixt the laws of the two countries affords evidence, as high as probability can go, either that we borrowed the Feudal law from England, or that they borrowed it from us. The latter is not maintained by any author; nor is there any foundation for the aſſertion, it being as well vouched as any point can be of ſuch antiquity, that William the Conqueror brought the Feudal cuſtoms along with him from Normandy: and it is certain, he had no intercourſe with Scotland, unleſs in the channel of enmity and war.

The circumſtance now mentioned muſt create a ſuſpicion, that the Feudal law is not of ſuch antiquity in Scotland as is generally believed. But it will be ſaid, That doubts and ſuſpicions, however great, muſt yield to poſitive evidence; and that, beſides

ſides the authority of all our hiſtorians for the fact above mentioned, we have evidence ſtill more convincing, *viz.* the laws of Malcolm II. ſtill extant, which bear, "That King Malcolm diſtributed all his "lands in Scotland among his men; re- "ſerving nothing in property to himſelf, "but the royal dignity, and the Mute-hill "in the town of Scoon. And all his ba- "rons gave and granted to him the ward "and relief of the heir of ilk baron, for "the king's ſuſtentation."

Theſe authorities appearing to be of weight, ſhall be treated reſpectfully. Suppoſing the above-mentioned laws to be thoſe of Malcolm II. the diſpute is at an end, not only from the evidence of the foregoing paſſage, but alſo becauſe in theſe laws frequent mention is made of Feudal cuſtoms, ſuch as the office of chancery, charters, ſeiſins, barons holding of the king, knights holding of barons, and others holding of knights, *&c.* But when I weigh this evidence of the antiquity of the Feudal law in Scotland, I perceive one circumſtance wanting

wanting to make it complete. That theſe are the laws of King Malcolm cannot be denied; they have in all ages been reckoned authentic, and King Malcolm is mentioned in the body of the work: but it may be juſtly doubted whether they be the laws of Malcolm II. We had four kings of the name of Malcolm; and we have no authority, but from the title, to aſcribe theſe laws to the ſecond of that name: but at what time, or upon what evidence this title was added, we are altogether uncertain. The title in the printed copy is obviouſly a *poſt facto* work; for it runs thus: "The "laws of King Malcolm Mackenneth, ſe- "cond of that name, who was ſon to Ken- "neth the Third, and began to reign in the "year of the creation of the world 4974, "and of Chriſt 1004. Theſe laws are "authentic," *&c.* This title proves only, that Skeen, the publiſher, believed theſe to be the laws of Malcolm II.; or rather, that finding this title in the manuſcript copies, he did not take upon him to make any alteration, however ſenſible he might be

that

that it could have no better foundation than a vague tradition.

But I chuſe not to reſt upon negative arguments. There is evidence the moſt convincing, that Malcolm II. was not the author of theſe laws. This evidence is drawn from the work itſelf, wherein frequent mention is made of earls and barons, of the chancellor and his court, coroner, *&c.* none of which names, in all probability, had a being in the time of Malcolm II. The court of chancery was not known in England before William the Conqueror; and it is not probable we had it before his time. But more poſitively, it is a fact agreed upon by all writers, that it was Malcolm III. who created the firſt barons and earls. Dempſter, the graveſt of our antiquaries, *p.* 120. *Malcolmus Tertius, ſublato Maccabæo tyranno, regnum legitime ſibi debitum occupavit; quod ut ornaret unica cura incubuit: tunc et a prædiis nobilibus nomina quiſque ſumpſit, et cum magna frequenſque nobilitas S. Margaretam ex Hungaria et Anglia ſecuta in Scotia conſediſſet, ſplendorem novo ſuo principatui additurus,*

additurus, Barones et Comites creavit. Before the days of Malcolm III. *Thane* was the only name in Scotland by which the nobles were diſtinguiſhed. None of our hiſtorians mention the title of Baron before his time, or of Earl. All were called *Thanes*, ſuch as, the Thane of Fife in MacBeath's time, Thane of Roſs, Thane of Sutherland, Thane of Caithneſs, *&c.*; but from Malcolm Canmore's time downwards, not a word of Thane; all the great lords are either Earls or Barons. Here then the evidence is complete, that theſe laws are not of a more ancient ſtanding than the reign of Malcolm Canmore; and to him therefore they muſt be reſtored: for they are the laws of one King Malcolm; and it is more probable they are his, than the laws of his great-grandſon Malcolm IV. before whoſe time the Feudal law was certainly introduced into Scotland.

This point being diſcuſſed, the argument drawn from the authority of the hiſtorians will not appear formidable. We have no author who wrote in the days of Malcolm Canmore,

Canmore, nor for many ages after: as our hiſtories, therefore, reſt upon no better authority than tradition, it is not ſurpriſing, that an event which happened in the reign of one king, ſhould be aſcribed to a predeceſſor of the ſame name; eſpecially as there is a prevailing bias in moſt nations to carry back their antiquities as far as poſſible. But the matter doth not reſt here; the error of theſe hiſtorians may be detected from their own writings. Hector Boece, for example, who aſcribes the introduction of the Feudal law, as aforeſaid, to Malcolm II. adds with the ſame breath, that it was Malcolm II. who divided Scotland into baronies. We have therefore this author's teſtimony, that the ſame Malcolm introduced the Feudal law, who divided Scotland into baronies. This was certainly Malcolm III. And Buchanan, tho' for the moſt part he implicitly follows Hector Boece, yet, in his relation of the foregoing event, expreſſes a doubt, and inclines to think, that we had the laws of ward and relief rather from the Engliſh and Normans.

That

That I may leave nothing untouched, concerning a point of importance in the antiquities of this country, I proceed to ſome other conſiderations which I foreſee may be urged to evince the great antiquity of the Feudal law in Scotland. One is made uſe of by the learned Craig to that very end: *Multa tamen ſunt quæ me movent, ut hoc jure (ſciz. Feudali) noſtrates uſos putem, antequam Angli eo uti cœperint. Hoc enim certiſſimum eſt, nos purius hoc jus habere quam vicinos; ut in rivulis aquarum qui quo propiores ſint fonti ſive ſcaturigini, eo ſunt puriores.* This author probably had in view the Feudal cuſtoms as they ſubſiſted in his own time; and it is very true, that in England the Feudal law began ſooner to decline than it did in Scotland. Arts and induſtry flouriſhed in that kingdom long before they had any life here; and I have obſerved elſewhere, that the ſtrict regulations of the Feudal law are in a great meaſure inconſiſtent with the arts of peace. But if Craig had under conſideration the Feudal law as it ſubſiſted in this iſland for ſome ages after the time of William the Conquer-

or,

or, he is undoubtedly in a miſtake. The Feudal law, during that period, was preciſely the ſame in both kingdoms, ſo far as we can gather, by comparing the ancient ſtatutes and law-books of England and Scotland.

The *Regiam Majeſtatem*, the oldeſt inſtitute we have of our laws, is generally believed to have been compiled in the reign, and by the authority of David I.: and as it contains a full and accurate ſyſtem of our Feudal cuſtoms, a probable argument may be ſuggeſted from it, that the Feudal law had a beginning in Scotland before the days of Malcolm Canmore. For if the Feudal law was introduced by that king, there is no probability it ſhould make a progreſs ſo rapid, as to furniſh materials for a complete inſtitute in the days of his ſon David. This is not agreeable to the natural courſe of things; and therefore not readily to be credited. Law is but of ſlow growth, eſpecially among a rude people, more addicted to the arts of war than of peace. And yet, whatever be the æra of the *Re-*

giam Majeſtatem, it appears from it, that the Feudal law was brought to a conſiderable degree of perfection in Scotland at that time. The argument is weighty; and we muſt either give the Feudal law a more early date in Scotland than the reign of Malcolm Canmore, or the *Regiam Majeſtatem* a later date than the reign of his ſon David I. With regard to this matter one thing is certain, that the *Regiam Majeſtatem* was compiled in the reign of one of our Davids. The author, whoever he be, declares in his preface, "That he was commanded by "King David to compile this work, with "the counſel and advice of the whole "realm, that all the inhabitants thereof "might learn and have knowledge of the "ſame." What remains is, to determine which of the Davids this was. If the reader will indulge a ſhort digreſſion, I ſhall make it evident, that it was David II. who reigned two centuries later than the other; the diſtance of whoſe reign from that of Malcolm Canmore, affords ſufficient time for the ripening of the Feudal law. All the world know, that the Roman law, after being buried

ried in oblivion for ages, was reſtored in Italy by an accident. The very books of that law were underſtood to be loſt paſt recovery, till a copy of the Pandects was found in the town of Amalphi, *anno* 1127, by Lotharius the Emperor, when he took that town, in the war he carried on againſt Roger King of Sicily and Naples. After this lucky accident, the Roman law ſpread ſo faſt, that it was taught publicly at Oxford by Vaccarius about the year 1150, during the reign of King Stephen. This was as ſwift a progreſs as any ſcience can be ſuppoſed to make; and there is no probability, therefore, that we had it in Scotland before that time, nor conſequently in the reign of David I who died in the year 1153. Theſe facts will give light to the ſubject on hand. The author of the *Regiam Majeſtatem* appears to be well acquainted with the Civil law, and frequently appeals to it as to a known law. See *lib.* 2. *c.* 16. § 2. The *Regiam Majeſtatem*, therefore, compiled when the knowledge of the Civil law was ſpread through Scotland, could not have a being in the days of David I.; and conſe-

quently the argument is concluſive, that it was compiled in the days of David II.

I have thus endeavoured to make out, that the foregoing remarkable revolution in our land-rights happened in the reign of Malcolm Canmore. And it muſt add to our conviction, that, were one reduced to a conjecture, this reign would be pitched upon before any other, for the introduction of the Feudal law. This law was brought into England by a conqueror, one at leaſt who treated his new ſubjects as a conquered people. It is evident, that the poſſeſſing of land by tenure, throws great weight into the ſcale of royalty; and therefore it will not be ſurpriſing, that a neighbouring prince, who underſtood his own intereſt, ſhould take the hint, and endeavour to proſecute the ſame meaſure. It muſt alſo be conſidered, that there never was in the reign of any of our kings, ſuch a conflux of ſtrangers into Scotland, as in the days of Malcolm Canmore; Engliſh eſpecially, ſome of the higheſt rank. By them the faſhion was begun of ſirnames, many of which remain at this day with our moſt

moſt illuſtrious families. To keep pace with England, the new titles of Earls and Barons were introduced; and we may readily believe, that a politic king, who underſtood the arts of government, would not ſtop ſhort, but endeavour alſo to introduce the Feudal law, which he ſaw would tend greatly to increaſe his power and authority. And the conviction founded on theſe circumſtances becomes ſtill more complete, when we conſider, that the practice of giving charters of lands, is by our antiquaries univerſally aſcribed to Malcolm Canmore. Many of our old families pretend to have had charters from that king, but none before his time. Now, ſuppoſing the Feudal law to have been as old in Scotland as Malcolm II. it is ſcarce ſuppoſable charters would be of a later date, as ſuch writs ſeem to be neceſſarily connected with Feudal grants.

And this leads to the ſecond branch of the inquiry, By what means, and after what manner were the nobles prevailed upon, not only to part with their lands, but

to ſubject themſelves perſonally to Feudal ſervice? However the thing might at firſt be diſguiſed, the total ſurrender of lands to the king during the minority of an heir, and the year's rent payable at the entry of every heir, were no ſlight perquiſites to be yielded careleſsly. The matter is dark; and hiſtorians have touched it ſo ſlightly, that we have few circumſtances to build conjectures upon. The ſtory is ſtill the more myſterious, conſidering the evidence we have of extravagant donations of the crown-lands by David I. in favour of the church. I cannot eaſily reconcile this with the ſtory, as told, that King Malcolm gave away the whole crown-lands, reſerving nothing to himſelf but the Mute-hill of Scoon. It is true, there might have been forfeitures in the interim; but this interim is, I am afraid, too ſhort, to make the ſolution be generally reliſhed. At the ſame time, King David's liberality to the church is condemned by every writer, as truly unjuſt with regard to his ſucceſſors, who were thereby deprived of their birthright, *viz* the patrimony of the crown: and yet the charge is ſcarce well

founded,

founded, if in fact nothing were given away, but forfeited lands, which every king is privileged to diſpoſe of at his pleaſure.

I am not diſpoſed to believe, that Malcolm Canmore gave away the whole crown-lands, as is related. Neither am I diſpoſed to believe, that by any means leſs than abſolute force, would the bulk of the nation be brought to ſubmit to an act ſo viſibly prejudicial to them, that of ſurrendering their whole lands to the king, and their perſons alſo, reſerving only the uſufruct, in name of wages, for ſervices to be performed by them.

In a matter ſo dark and intricate, I dare venture no farther than to ſuggeſt a few conjectures. Before the Feudal law was known in Scotland, I take it for granted, that our people held their lands without writ; and that poſſeſſion was the circumſtance which determined the property of lands, as at this day it doth of moveables. Some traces of this we have remaining in the Orkney iſlands, where the Feudal law is

ſcarce

ſcarce yet fully eſtabliſhed. If inſtead of introducing the Feudal law all at once over the whole kingdom, it ſhall be ſuppoſed, that Malcolm Canmore did no more but lay the foundation of a building, which was finiſhed by his ſucceſſors, the thing will be eaſily credited: and touching the engines made uſe of, we need not be at a loſs; for we are directed to them by our authors. Theſe engines certainly were the crown-lands, a prudent diſtribution of which, or part of them, would go a great way to allure the nobles. No perſon upon whom crown-lands were beſtowed, could refuſe to hold them upon any conditions the king was pleaſed to impoſe. Here was a beginning given to the Feudal tenure. If the gift were conſiderable, the receiver could not handſomely avoid allowing his own eſtate to be ingroſſed in the charter, ſuppoſing the thing to be demanded of him. And ſuch ſtratagems would not be overlooked by an artful monarch, who had it at heart to make the Feudal law univerſal in his kingdom.

Malcolm

Malcolm had another engine at hand. It was this king incontrovertibly who introduced the titles of Earl and Baron In this he had poſſibly a further deſign, than merely to emulate the ſplendor of a neighbouring court. Our forefathers were fond of titles, and were delighted with ſhew and equipage. If ſome were tempted by a new title to give up their independency, and to accept of their own eſtates as a gift from the king, holding of him by military tenure, we ſhall ceaſe to wonder at the unequal purchaſe, when we ſee ſo many in later times renouncing their independency, and giving themſelves up as ſlaves to a court, for ribands and garters, ſtill more empty geugaws, if poſſible, than titles of honour.

The foundation being thus happily laid, our kings had many opportunities to carry on the work. Our forefathers were a fierce and reſtleſs people; property was in a continual flux by forfeitures; and it is probable, that, firſt and laſt, the bulk of the *terra firma* of Scotland has, by that means, paſſed through

through the ſovereign's hands. This afforded ample means of extending the Feudal law farther and farther, as care was always taken to make out gifts of forfeiture in the Feudal form.

One other cauſe there was of the growth of the Feudal law, which, though working ſilently and imperceptibly, had, I am perſuaded, a more extenſive effect than all the other cauſes combined together.

Mankind, eſpecially in ignorant ages, are governed by cuſtom and habit. By the growth of the Feudal law, a charter certainly came to be conſidered as a moſt ſolemn title to land, ſo as to give to poſſeſſion alone, without a charter, but a ſlender hold of the imagination. Perhaps this had no remarkable effect with regard to old poſſeſſors. But purchaſers were in a different caſe. Perſons who give money for land, will not readily be ſatisfied with any title that is not of the beſt ſort. Thus, after introducing the commerce of land, we may truſt that charters were multiplied exceedingly.

ceedingly. For whatever ſecurity a family might have from a long continued poſſeſſion, the notion would in time be firmly eſtabliſhed, that there was no ſecure method of transferring land-property but by charter and ſeiſin.

My conjecture, in ſhort, is, that the Feudal law was not introduced all at once, as our authors inſinuate, but by degrees. And this conjecture is ſupported by what I have often heard, that ſo late as the reign of James VI. there were landed gentlemen in Scotland who never had accepted of a charter.

If I am not deceived, this was a meaſure the moſt politic, and of the greateſt forecaſt, that ever was contrived. It was a bold game for the king, to play away his crown-lands for a ſmall conſideration in hand; but the proſpect was fair, as no conſtitution more firmly unites a people to their ſovereign, than that introduced by the Feudal law, nor gives the ſovereign ſuch an immediate hold of the perſons and proper-

ty

ty of his ſubjects. Our hiſtorians give us to underſtand, that a prevailing deſire to ſupport the dignity of the crown, gave riſe to the Feudal law in Scotland. I am ſorry to obſerve, that inſtances of public ſpirit, even among individuals, are rare in our hiſtory. But I have read of no inſtance of an univerſal public ſpirit through a whole nation, ſufficient to bring about ſuch a revolution; one excepted, among the Lacedemonians, in the days of their king Lycurgus*.

* Nor is the evidence of this piece of hiſtory altogether above exception. Xenophon, who writes a treatiſe upon the Spartan government, has not a word of it.

ESSAY

ESSAY II.

CONSTITUTION OF PARLIAMENT.

BY the Feudal conſtitutions, every ſuperior had a jurisdiction within his own territory: his vaſſals were obliged to attend his courts, and it was their province to try all cauſes, civil and criminal, in form of a jury or aſſize. Such is the conſtitution of our county-courts to this day, held at ſtated times by the high ſheriff, in name of the king; the crown-vaſſals being all of them bound to appear under a penalty, each in the court of the county within which his lands are ſituated. The parliament is the king's court for the kingdom in general; and conſequently his whole vaſſals within the kingdom were bound to give their attendance there. The barons and freeholders attended in this capacity: the biſhops, abbots, and priors, attended in the ſame capacity; and if any of them held their land of a ſubject, they were not bound to perform this ſervice.

The idea of a king, where the Feudal law took place, is not that of a chief magiſtrate or governor, but that of a paramount ſuperior, having the whole land-property of the nation veſted in him, having his vaſſals attached to him by homage and fealty, and ſupported by him out of the produce of his lands: which makes a very ſtrict connection and union betwixt them. The idea of a parliament, as I have ſaid, is that of a court where all the king's vaſſals are obliged to attend for adminiſtering juſtice, and for making regulations to bind the whole ſociety.

It was one effect of the Feudal law, to withdraw land from commerce. Land being allotted for the maintenance of ſervants or vaſſals, ready to obey their maſters commands in war and peace, the ſuperior could not ſell, becauſe the whole profits ariſing from the ſubject belonged to the vaſſal; and the vaſſal could not ſell, becauſe he was not proprietor. This was an unnatural conſtitution, which could not ſubſiſt long in peaceable times. The ſeverity of the Feudal law

law gave place by degrees to milder and more natural regulations. Land, the moſt deſirable acquiſition, was reſtored to commerce, and the crown-vaſſals, originally few in number, and poſſeſſing large territories, were greatly multiplied. Purchaſers were willing to hold of the king rather than of a ſubject; and the king was willing to encourage this commerce, as it leſſened the power of the great barons. The obliging ſo many ſmall vaſſals to an expenſive attendance in parliament, was, in time, conſidered as a grievance. In England this grievance was remedied, probably in the days of John, or Henry III.; for the record of that tranſaction is loſt. The remedy was introduced with us later, and we have the record entire. By the act 101. parl. 1427, the attendance of ſmall barons and freeholders is diſpenſed with, provided they ſend to parliament, from every ſhire, two or more of their number to repreſent them.

We followed the Engliſh ſo cloſe in all their regulations concerning law and policy,

that I am perſuaded our ſtatute 1427 was copied from ſome Engliſh ſtatute enacted by King John, or in the beginning of the reign of Henry III. which is now loſt with the other ſtatutes of that period. One thing is certain, that we find knights of the ſhire elected by the ſmaller crown-vaſſals, preciſely as in Scotland, early in the reign of Henry III. But this is not all. We find by King John's charter of privileges to his Engliſh ſubjects, ſect. 17. and 18. that it was the practice in his days, to ſummon to parliament the greater barons by name, leaving the leſſer barons and freeholders to be ſummoned by the ſheriffs edictally, or in general terms. Here we have the leſſer barons attending perſonally. From the reign of Henry III. downwards, the ſmall barons and freeholders never did duty in parliament, otherwiſe than by ſending ſome of their number out of each ſhire to repreſent them. This makes it evident, that the attendance of the ſmall barons and freeholders, muſt in England have been diſpenſed with, as in Scotland, upon condition of their ſending repreſentatives. Their withdrawing

withdrawing from parliament might have been overlooked; but ſo ſingular a regulation, as that of acting by delegates, could never have been introduced otherwiſe than by a ſtatute. The thing merits attention, becauſe it laid the foundation of a houſe of commons; of which more fully afterwards.

Whether the royal boroughs were originally conſtituent members of the parliament, is a point much debated. It is obſerved, "That the *Reddendo* of their charters being "watching and warding only, they were "not bound to give ſuit and preſence in "any of the king's courts; that they had "a court peculiar to themſelves, which "was the chamberlain-ayr; that *de facto* "there is no inſtance of their ever appear-"ing in a county-court, and conſequently "no reaſon to believe they appeared origi-"nally in parliament; and that in Eng-"land there is no evidence upon record, "of burgeſſes being called to parliament, "before 49th Henry III. at which time "writs were directed to the ſheriffs of the

" ſeveral counties, to return the knights of " the ſhire and burgeſſes; whence it is " conjectured, that the calling of the bur- " geſſes to parliament was a politic of Si- " mon de Montfort, who had at that time " the power of the kingdom in his hands, " and who called the parliament 49th Hen- " ry III. in order to purge himſelf from " ſuſpicions ſpread abroad of his intending " to uſurp the crown." One fact appears, with regard to Scotland, that in a preamble to the laws of Robert Bruce, ſtill extant, the whole orders are faithfully enumerated, biſhops, abbots, priors, earls, barons, and other noblemen of the realm, without a word of burgeſſes. In a preamble to the laws of Robert III. burgeſſes are mentioned for the firſt time; and the conjecture is, that many of the noble families having been extinguiſhed, during the ſtruggles we had for liberty againſt the two Edwards of England, King Robert Bruce, in order to recruit the parliament, found it neceſſary to call the royal boroughs to a participation of the government.

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Theſe ſpecious facts and obſervations notwithſtanding, I am of opinion, that the royal boroughs made originally one of the eſtates of parliament. What determines me to think ſo, are the following reaſons. In the *firſt* place, they are the king's immediate vaſſals, and therefore bound to attendance equally with the barons and prelates; *ſuite and preſence* in the ſuperior's courts being a duty eſſential to every feudal holding, unleſs where expreſsly remitted. *Secondly*, Attendance in parliament, in old times, being reckoned a burden or ſervice, by no means a privilege, the royal boroughs would not have obeyed a ſummons from the king, unleſs they had been bound by their holding; and our kings were by no means ſo abſolute, as by their mere will to introduce a regulation of this general and important nature. And in the *third* place, Suppoſing the king's authority great enough to oblige the boroughs to ſubmit to this incroachment upon their privileges, we cannot ſuppoſe a wiſe and juſt prince, like Robert Bruce, would undertake ſuch a violent meaſure, not only without neceſſity, but

but where a more natural remedy was at hand. For if many noble families were extinguiſhed, their eſtates ſurely were not; which falling to the crown, by the ſuppoſition, through the failure of heirs, were an ample fund for increaſing the number of crown-vaſſals to fill the parliament. *Laſtly*, It is preſumable the commerce of land had crept in before this time, and that the crown-vaſſals were rather more numerous than formerly. It is certain, they were ſo greatly multiplied the very next century, that it was thought expedient to exempt the ſmaller barons from their attendance.

And, in anſwer to what is urged on the other ſide, the *Reddendo* of watching and warding proves nothing; many ſervices being due which are not expreſſed in the charter. Witneſs the common ſtyle of ward-holding, *Reddendo ſervitia ſolita et conſueta.* The exemption of the royal boroughs from attending in the county-courts, has more the appearance of an objection. But this indulgence, and the having a court peculiar to themſelves, *viz.* the chamberlain-court, will

will not infer their exemption from parliaments, where laws are made binding upon the whole kingdom; whereas judicial proceedings were the only ſubject-matter of chamberlain-ayrs, nothing being there tranſacted relating to public policy or government.

Though there is no mention of calling burgeſſes to the Engliſh parliament before the 49th Henry III. it appears to me a very lame inference, That the practice began at this time, when we find the records of preceding tranſactions ſo imperfect. At the ſame time, were theſe records entire, and were there no inſtance before that period of a writ directed to the ſheriff for calling burgeſſes to parliament, it would not follow, that the royal boroughs were no ſooner aſſumed as a branch of the legiſlature. This muſt be explained. It is mentioned above, to have been the practice in King John's days, to call only the greater barons by name, and to leave the leſſer barons and freeholders to be ſummoned by the ſheriffs edictally, or in general terms. Probably the repreſentatives

repreſentatives from boroughs were ranked with the leſſer barons, and not honoured with a perſonal citation. When the attendance of the ſmaller barons came to be diſpenſed with, upon their ſending repreſentatives, this change in the conſtitution introduced an alteration in the ſtyle of the writs directed to the ſheriffs. Inſtead of the old form, injoining the ſheriff to notify publicly the holding of the parliament, that all who were bound might attend, he was commanded ſpecially to return two knights of the ſhire: this made it neceſſary to be equally ſpecial with regard to the repreſentatives of the boroughs; and therefore, in the writ, he was directed to return two knights and two burgeſſes. This circumſtance therefore proves nothing, but that in Henry III.'s time the ſtyle of the writ was changed, and made ſpecial, inſtead of being conceived as formerly in general terms. But further, the circumſtances of the caſe are a ſtrong evidence to me, that this was not the firſt time the attendance of the boroughs in parliament was required. Hiſtorians mention, that this parliament was called by Montfort,

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in order to purge himſelf of a ſuſpicion, which was gaining ground, of his aiming at the crown. It is not ſaid he had any peculiar connection with the boroughs, to make their preſence of uſe to him; and unleſs it were in ſome ſuch view, I cannot imagine, that Montfort, in ſuch tickliſh circumſtances, would think of making any alteration in the conſtitution. At the ſame time, the plain and ſimple ſtyle of the writ proves it to have been a common and known writ of the law of England. Had any thing extraordinary been injoined, it muſt have been introduced with a preamble to ſupport the innovation; eſpecially as this was not a matter of courſe, but a ſummons, which the boroughs were not bound toobey.

I have enlarged the more upon this point, as it tends to aſcertain what was the original conſtitution of parliament; and to prove, that all the king's vaſſals, and none other, were the conſtituent members. As perſonal attendance was required, there was no place for repreſentatives, unleſs from the boroughs. It would have been an hardſhip intolerable,

tolerable, to oblige a whole community to perſonal attendance; and therefore we may well ſuppoſe, that in all times this attendance has been diſpenſed with, upon ſending a few of their number to repreſent them. This originally was the only repreſentation, properly ſo called.

Thus we ſee how the ſmall crown-vaſſals came to be exempted from their attendance in parliament, both in England and Scotland. In Scotland, theſe vaſſals had ſo little attention to the public, that, pleaſed with their exemption, they thought not of fulfilling the condition by ſending repreſentatives, till the regulation was enforced by a new law; of which afterwards. In England, the caſe probably would have been the ſame, but for the peculiar circumſtances of the times. One thing appears, that in a parliament held by Henry III. *anno* 1258, there were but twelve repreſentatives from the ſmall barons Yet ſoon thereafter ſtruggles betwixt the king and his great barons growing hot, there were in the parliament 1264 no fewer than four knights for each county.

county. This full repreſentation was probably occaſioned by the anxiety of the barons, deſiring a numerous aſſembly, to give weight to their proceedings. And the regulation having once taken place, would readily be kept up, without any new impulſe, with the difference only of more or fewer repreſentatives from each county.

The ſending repreſentatives, in place of the ſmall crown-vaſſals, was but one ſtep towards eſtabliſhing the Engliſh houſe of commons in its preſent form. Though the king's vaſſals convened in parliament, were diſtinguiſhed into three eſtates, the Spiritual Lords, the Temporal Lords or Barons, and the repreſentatives from the royal boroughs, we muſt not imagine they made three diſtinct bodies: they were all equally the king's vaſſals, and compoſed but one body politic, which ſat and voted in one houſe. And this form continued in Scotland ſo long as our parliament ſubſiſted, after we had repreſentatives from ſhires, as well as before. In England, for many centuries, the greater barons have made one body, the repreſenta-

tives from the ſhires and boroughs another, who ſit in different houſes, and debate and vote ſeparately. At what period this form was eſtabliſhed, is altogether unknown, ſo far as I can learn; though the thing be extremely remarkable, by the change it has made in the conſtitution of the Engliſh government. This only is certain, that there were two houſes of parliament before the 1376: for, in a parliament held that year, Peter de la Mare is mentioned by hiſtorians as ſpeaker of the houſe of commons; which is a pretty ſtrong evidence, that the commons were at that time ſeparated from the peers, having a preſident or ſpeaker of their own; for one body cannot readily admit of two preſidents.

As this diviſion of the Engliſh parliament into two bodies, was no neceſſary conſequence of ſubſtituting repreſentatives in place of the numerous body of electors, I am apt to imagine, that the difficulty of accommodating all the members in one place, occaſioned the ſeparation. Parliaments were of old ambulatory. Scarce a great town in

in England but, one time or other, has been honoured with a parliament. However ill accommodated, there were no means for a ſeparation, while all the crown-vaſſals ſat in their own right: for they could not think of making a ſeparate body of a few repreſentatives from boroughs. But after repreſentatives were introduced in place of the ſmall vaſſals of the crown, a diviſion into two bodies was readily practicable, by placing the ſpiritual and temporal lords in one room, the repreſentatives from the ſmall crown-vaſſals and from the boroughs in another. This practice probably had its beginning in towns where no ſingle room was found large enough to accommodate the whole body; and has been kept up in other towns where there was not the ſame neceſſity; poſſibly by the influence of the peers, upon whom it conferred an additional luſtre. The ſilence of hiſtorians favours this conjecture. Had this diviſion of the parliament been the reſult of any ſolemn act, whether of the parliament itſelf, or of the king and council, ſuch a regulation

would not readily have eſcaped notice*. However this be, the ſplitting of the Engliſh parliament into two bodies, laid the foundation of a great change in the conſtitution. And this event, among many, is an inſtance of revolutions which ſpring from the moſt accidental or trivial circumſtances; and for that reaſon are extremely obſcure in their origin, however remarkable in their ſubſequent appearance.

As our James I. by his long reſidence in

* In accounting for the cauſes of dark events, we muſt be ſatisfied with conjecture where evidence is wanting; and for dividing the Engliſh parliament into two houſes, no cauſe appeared more probable than that ſuggeſted in the text. But, ſince the former edition, I have diſcovered ſome authority for aſſigning a different cauſe, *viz.* "That the commons, ſitting in preſence of the king, and among the nobles, diſliked it, and found fault that they had not free liberty to ſpeak. And, upon this reaſon, that they might ſpeak more freely, being out of the royal ſight of the king, and not among the great lords, ſo far their betters, the houſe was divided, and came to ſit aſunder." *Journals of Q. Eliſabeth's parliaments by Sir Simon D'Ewes, p.* 515.

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England, was perfectly well acquainted with the Engliſh conſtitution, it appears to have been his plan, to introduce into his own kingdom many of the laws and cuſtoms of that country. What we have at preſent to take notice of, are contained in the above-mentioned ſtatute, act 101. parl. 1427: *1ſt*, Exempting the ſmall barons and freeholders from attendance in parliament, upon condition of ſending repreſentatives; *2d*, Making theſe repreſentatives, perhaps with the repreſentatives from the boroughs, a ſeparate body, which appears from the regulation appointing a preſident to be choſen, called the *common ſpeaker* of the parliament; *3d*, Enacting that the prelates and peers ſhould be called to parliament *nominatim* by ſpecial precepts. Touching the firſt of theſe regulations, of which mention has been made above, the act did not take effect. The ſmall vaſſals of the crown, who had their own more than the public intereſt at heart, laid hold of the exemption given them, without thinking of ſending repreſentatives, becauſe theſe repreſentatives were to be ſubſiſted at the charge of their conſtituents.

And as to the prelates and great lords, in whom the power of the parliament centered after this regulation, it was evidently againſt their intereſt that repreſentatives ſhould be ſent. The king indeed had an intereſt, in order to balance the exorbitant power of the nobles; but in thoſe rude times this was overlooked, inſomuch that a ſtatute was obtained in the reign of James II. *viz.* act 75. parl. 1447, relieving all freeholders from attendance, whoſe yearly rent did not amount to 20 *l.* without a word of their being obliged to ſend repreſentatives. Matters continued upon this footing till the days of James VI. ſave that by the act 78. parl. 1503, all were exempted from attendance whoſe rent was within one hundred merks. The Reformation greatly increaſed the power of the nobility, as it almoſt extinguiſhed the prelates. The abbacies were totally demoliſhed; and but few of the biſhops frequented the parliament. By this means the nobility had all in their power: they oppreſſed the boroughs, and were too ſtrong for the king. Thus the government became purely ariſtocratical, and ſtood in need

need of ſome regulation to bring it to its former poiſe. Had the act of James I. been followed out, in the ſame manner as the like regulation was followed out in England, this evil would have been prevented: and now the only remedy was to revive that act. The ſurpriſe is, that a majority was found among the nobility, to countenance a regulation, which behoved remarkably to abridge their authority. It appears from the ſtatute, which is the 114th, parl. 1587, that great oppoſition was made. The attendance of the ſmall barons in parliament was ſo thoroughly in diſuſe, that they could not now think of reſuming as a privilege, what they had ſo long been exempted from as a ſervice. But it had all along been eſteemed the prerogative of the crown, acknowledged in every ſtatute relating to the parliament, that the king might call, by ſpecial writ, any of his vaſſals to attend the parliament, notwithſtanding their exemption. Probably this was the means made uſe of by the king's miniſters, to gain the end propoſed: the nobles would be told, that if they voted againſt the regulation, the king

king would uſe his privilege of calling to parliament a number of his ſmall vaſſals, ſufficient to overbalance the nobility. As this is merely a conjecture, it is ſubmitted to the judgment of others. One thing is certain, that the act 1427 was revived, and the ſmall barons ſent repreſentatives to parliament from that period downwards.

I have mentioned above, that it was a part of the plan of James I. to divide his parliament into two bodies, as in England. This was not followed by James VI. for our parliament continued one body to the end. It is left to conjecture, whether this was of deſign, or by accident; for our hiſtorians are extremely defective upon our civil tranſactions. We have no occaſion to go farther than to England, to learn what influence it has upon the conſtitution, to divide a parliament into two houſes; and as it was a politic age, this of James VI. I am apt to believe, it was not without deſign, that the parliament of this kingdom was continued upon its old footing. This is a curious ſubject, and deſerves peculiar attention. It

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is pretty obvious, that the king's negative againſt a regulation agreed to by both houſes, is not a very valuable privilege. The opinion of the two houſes, underſtood to be the ſenſe of the nation, has too great force to be reſiſted by the *Veto* of any ſingle man, the king not excepted. His refuſing an aſſent in ſuch a caſe, is virtually declaring himſelf againſt the intereſts of his people. But an Engliſh monarch is ſeldom brought under this dilemma. The narroweſt majority in either houſe, on his ſide, relieves him. He may appear to be neuter. Thus, taking the parliament complexly, a great majority may be againſt the king, bent, we may ſuppoſe, to fetter him with new limitations; and yet he may ward the blow, by gaining over a majority in either houſe. This cannot happen where the parliament makes but one body, as in Scotland. So far the advantage lies on the king's ſide, where the parliament is compoſed of two bodies. But to balance this, the ſame advantage lies on the ſide of the people, where the king's views are to enlarge his prerogative by authority of parliament; for

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a majority in either houſe, interpoſing a *Veto*, fruſtrates his deſign. In a word, a ſingle body gives great opportunities for making incroachments on either ſide; whereas, ſuppoſing the conſtitution to be ſound and entire, it is beſt preſerved ſo, by a parliament compoſed of two bodies.

So far the ſcales ſeem to hang upon a level. But then ſeldom is a nation ſo united, as to think of making incroachments upon the prerogative-royal: whereas the king, a ſingle perſon, has many opportunities, and ſeldom wants inclination, to enlarge his powers. King James and his miniſters could not but be ſenſible of this; and therefore a ſingle body was their game. But the contrivance lay a little deeper; and this may be diſcovered, by attending to one branch of the conſtitution of the parliament, peculiar to Scotland. At what time the lords of the articles were eſtabliſhed, is uncertain. But as the ſeſſions of our parliament were generally ſhort, it was found neceſſary, when buſineſs multiplied, to elect a certain number out of each eſtate, to prepare and digeſt

digeſt matters for the parliament. This ſelect body was called the *Lords of the Articles*; and it was a rule, that no buſineſs could be introduced into parliament, but what was prepared by theſe lords. This was in reality a negative before debate, which is of vaſtly greater importance than the king's negative after; and the worſt of it is, that there was no remedy, in our conſtitution, againſt the partiality of the lords of the articles, however glaring it might be. A body thus conſtituted, could not fail in time to ingroſs, in a great meaſure, the authority of parliament. And in fact ſo limited were, at length, the powers of the parliament, that it ſeldom had occaſion to ſit above two days. On the firſt day of meeting, an equal number out of each eſtate were choſen to be the lords of the articles, to whom the king joined eight of his crown-officers. Theſe received all the grievances or articles that were brought to them, and formed them into bills, or rejected them, at their pleaſure. When all matters were ready, the parliament ſat another day, and it was their only buſineſs to approve

approve or reject the bills that were laid before them.

Such was the practice in the year 1587, when the act of James I. was revived. The king had a fair chance to ſecure the lords of the articles for him, whether by influencing their election, or by gaining them after they were elected. At any rate, eight officers of ſtate devoted to the king, muſt have had great influence in ſo ſmall a body. By this means the king was pretty ſecure, that nothing would be brought into parliament without his approbation. But this influence was not reckoned ſufficient. About this very time, or ſoon after, a ſcheme was laid, and executed, to improve upon the foregoing regulation. Under pretext that the lords of the articles had not ſufficient time to overtake the multiplicity of affairs laid before them, four perſons were to be named out of each eſtate, whoſe province it was to meet twenty days before the parliament, to receive all ſupplications, &c. to reject what they thought frivolous or improper, and to digeſt into a book what they choſe

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to lay before the lords of the articles. This was done by the act 218. parl. 1594. The act may be thought defective, as no proviſion is made in it for the choice of this ſelect body. But this was purely an artifice. It would have been too barefaced to have named the king openly; for it was the ſame with giving him a negative before debate: and yet obviouſly the choice behoved to reſt upon the king; for a body that was to meet before the ſitting of the parliament, could not poſſibly be choſen by the parliament. But this was not all. To ſecure to the king abſolutely the power of bringing matters into parliament, it is further declared, "to be the privilege of the king, to bring "directly into parliament, all matters con-"cerning himſelf, or common good of the "realm."

This ſtatute was too manifeſt an incroachment upon the liberty of the ſubject, to be patiently ſubmitted to. It has for that reaſon been dropt; for I cannot otherwiſe conceive, what need there was for the artifice made uſe of by the miniſters of Charles I.

in the parliament 1633, to ſecure the lords of the articles for the crown; to wit, that the biſhops ſhould chuſe eight peers, and the peers eight biſhops; and that theſe ſixteen ſhould jointly chuſe eight barons, and eight commiſſioners for boroughs. With theſe were joined the officers of ſtate; and thus were the lords of the articles conſtituted, the chancellor to be preſident in all their meetings. The artifice here is obvious. The biſhops were univerſally devoted to the crown, as they have been at all times, and upon all occaſions. The eight peers elected by them were ſure cards for the crown, ſuppoſing but eight of ſo numerous a body capable of ſuch a bias. As the whole biſhops were for the crown, it was indifferent which eight were choſen; and we may be certain, that none would be choſen out of the commons, but what were for the king's purpoſe, when ſuch were the electors. This method, we may believe, was not practiſed by the parliaments during the troubles. They ſhewed their diſlike to ſuch artifices, by abrogating the above-mentioned ſtatute 1594. It was judged too bold a ſtep to revive

vive this ſtatute after the reſtoration. But as the parliaments, both of England and Scotland, which were called upon the reſtoration, were abundantly obſequious to the king's meaſures, another ſcheme was ventured upon, very little more diſguiſed, which was, to enact into a law the regulation contrived in the 1633, to ſecure the lords of the articles for the crown. This was done by the firſt act, parl. 1663. And thus, by the conſtitution of the Scotch parliament, nothing in effect could be brought under deliberation but by the king's ſpecial authority, which was an abſolute bar to all ſtatutes for ſecuring the liberty of the ſubject. On the other hand, he had a much better proſpect of obtaining laws for his own benefit, than he had in England. A majority did his affair, which did not always anſwer in the other kingdom. For ſuppoſing, upon the whole, a majority for the king; yet if there were the narroweſt majority in either houſe againſt him, nothing could be carried on.

For my part, I ſhould have thought it

leſs criminal in our reſtoration-parliament, to have openly beſtowed upon the king, a negative before debate, than, in ſuch an underhand artificial manner, to betray their conſtituents and nation. This will ſtand as a monument of the wicked enterpriſes of miniſters, and of the venality of our parliaments; and long may it ſtand, if it ſerve as a warning to guard us againſt ſuch opprobrious devices, if ſuch ſhall ever again be attempted.

With relation to the third article of the regulations introduced by the ſtatute 1427, that the prelates and peers ſhould be called to parliament by ſpecial precepts, we muſt recapitulate, in a few words, what has been ſaid above upon the Engliſh form of calling a parliament. Parliaments originally were called by iſſuing brieves out of the chancery to the ſeveral ſheriffs, directing them to ſummon in general, or edictally, all thoſe who were obliged to attend in parliament. A public notification, probably at the market-croſs of the ſhire, was thought ſufficient. Beſides this general ſummons, which comprehended

comprehended all the ranks equally, a form was introduced, in the reign of King John, of writing letters to the prelates and great lords by name, acquainting them of the time and place of holding the parliament, and requiring their attendance. When repreſentatives were introduced in place of the ſmall barons, the general ſummons was laid aſide as uſeleſs. The great barons were called by ſpecial letters, and the brieves directed to the ſheriffs, came now to be more ſpecial, ordering them to return two knights of the ſhire, and two burgeſſes out of each borough within the ſhire; which form is continued down to this day. In Scotland, where the ſmall barons laid hold of their exemption, without ſending repreſentatives to parliament, the general or edictal citation continued in uſe as formerly, with this addition only, that, beſides the general citation, letters came to be directed to every one of the great lords in particular. There was not the ſame neceſſity here to alter the form of citation, that there was in England: The general ſummons anſwered the purpoſe now as well as formerly; for, not compre-

hending any but who were bound to give attendance, it readily accommodated itſelf to the new regulations, exempting from attendance thoſe whoſe yearly rent was under a certain ſum. That the general and ſpecial ſummons were uſed at the ſame time, is clear from an order of James III. for diſſolving the parliament and calling a new one, entered in the records of parliament, 21ſt February 1487. The words are, "We "do you to wit, that our ſovereign Lord, "by the advice of his council, has, for "certain reaſonable and great cauſes, de-"ſerted and diſſolved his parliament, that "was continued of before to the 5th of "May next to come, and has ordained a "new general parliament to be ſet, and "proclaimed to be holden at Edinburgh "the 12th day of May next to come, with "continuation of days, and general pre-"cepts to paſs to all lords, prelates, ba-"rons, freeholders and commiſſaries, and "with ſpecial letters under his ſignet, to all "the prelates and great lords of his realm, "to ſhew and declare to them the cauſe of "the ſitting of his ſaid parliament."

I have annexed a copy of the brieve iſſued out of the chancery for an edictal citation; but I have not been ſo lucky as to find anywhere the form of the ſpecial precept under the ſignet. This precept probably has wore out of uſe, and the calling of the parliament been left to the edictal citation, comprehending all perſons who were bound to give attendance. What confirms me in this opinion is the ſtatute 1587, ſo often above mentioned, directing commiſſioners to be choſen for each ſheriffdom, and their names to be notified to the director of the chancery. The form of calling theſe commiſſioners to parliament is expreſſed in the ſtatute: "That the ſaid commiſſioners "be warned at the firſt, by virtue of pre-"cepts forth of the chancellary; or by his "Highneſs's miſſive letters; and in all time "thereafter by precepts of the chancellary, "as ſhall be directed to the other eſtates." At this period it would appear there was no other precept in uſe but that iſſued out of the chancery, *viz.* the brieve directed to the ſeveral ſheriffs, ordering a general or edictal ſummons. And this brieve alſo was

afterwards

afterwards laid aſide, and in place of it parliaments were convened by the king's proclamations.

The form of calling a Britiſh parliament, ſo far as concerns Scotland, is appointed by particular ſtatutes. In order to the electing of the ſixteen peers, a proclamation is iſſued under the great ſeal of Great Britain, commanding all the peers of Scotland to aſſemble, at ſuch time and place as is appointed in the proclamation, then and there to elect the ſixteen peers: and the proclamation muſt be duly publiſhed, at the market-croſs of Edinburgh, and in all the county-towns of Scotland, twenty-five days before the meeting for election; 6th Anne 22. The like proclamation might have ſufficed for the meeting of the freeholders in every county, to chuſe their repreſentatives; but a different form was choſen; and reaſonably, being more analogous to the practice of England. Brieves or writs under the great ſeal of Great Britain, are directed to the ſeveral ſheriffs and ſtewards; who, on receipt thereof, muſt forthwith intimate the time of election

tion of the commiſſioners for ſhires; and, at the day appointed, the freeholders muſt convene at the head-borough of their ſhire or ſtewartry, and proceed to the election of their commiſſioner. And the clerk of the meeting muſt immediately return the name of the perſon elected, to the ſheriff or ſteward; who ſhall annex it to his writ, and return it with the ſame into the court out of which the writ iſſued. By authority of the ſame brieve or writ, the ſheriff or ſteward muſt forthwith direct a precept to every royal borough within his juriſdiction, commanding them forthwith to elect a commiſſioner, as they uſed formerly to elect commiſſioners to the parliament of Scotland, and appointing the commiſſioners to meet at the preſiding borough of the diſtrict, upon the 30th day after the day of the teſte of the writ, there to chuſe their burgeſs for the parliament. And the common clerk of the preſiding borough muſt, immediately after the election, return the name of the perſon elected, to the ſheriff or ſteward; who ſhall annex it to his writ, and return it with the ſame, as aforeſaid; 6th Anne 5.

By

By an edictal or general ſummons one benefit ariſes to the ſubject, which was not attended to when the ſtatute 1587 was made, otherwiſe it is probable this form of ſummons would have been laid aſide, and that of perſonal citation taken up; for which there was the better colour, that it was following out the plan laid down by James I. Upon an edictal citation, every baron who has a ſeat is intitled to appear in parliament, becauſe he is called: but by a perſonal citation, opportunity is given to drop out of the liſt, any particular baron the king is not pleaſed with. Attendance in parliament is a perſonal ſervice, which cannot be performed by the vaſſal, unleſs the ſuperior chuſe to accept of it; and for this reaſon it is not due, unleſs demanded. A baron, therefore, who is not called, cannot regularly take his ſeat in parliament. This matter is well underſtood in England, where many times the advantage has been laid hold of, which a perſonal citation gives the king. One remarkable inſtance there is in a parliament convened by King Henry III. *anno* 1255, when a great many lords were omitted

omitted to be ſummoned, who were not in the king's intereſt. This is a defect in our conſtitution, to which I know of no remedy, other than the danger there would be in taking advantage of it. A ſtep ſo evidently ſubverſive of the conſtitution, would alarm the whole nation.

The Preamble to the Statutes of Robert III.

PArliamentum Domini noſtri Roberti Tertii Scotorum Regis illuſtriſſimi, tentum apud Sconam, die Lunæ, viceſimo primo Februarii; anno gratiæ milleſimo quadringenteſimo, regni ſui undecimo, cum continuatione dierum ſubſequentium: ſummonitis et ibidem vocatis, more ſolito, epiſcopis, prioribus, ducibus, comitibus, baronibus, libere-tenentibus, et burgenſibus, qui de Domino noſtro Rege tenent in capite.

Form

Form of the Writs for calling a Parliament in Scotland.

The parliaments of Scotland were of old called and convened by brieves directed forth of the chancery; for iſſuing of which brieves, there was an act or ordinance made by his Majeſty, with advice of his privy council, for the director's warrant, in the following terms.

THE King's Majeſty, with advice of his council, has ordained an parliament to be proclaimed, to begin in the burgh of Edinburgh, the day of for ordering, treating and concluding of ſuch great matters as inſtantly occur concerning the King's Grace, the weal of this realm, and the lieges thereof: therefore ordains the director of the chancery, to direct precepts to all prelates, barons, commiſſars, and bealzies of boroughs, and all others, our ſovereign Lord's freeholders within this realm, charging them to compear, the ſaid day and place, for their advice

vice to be had in ſuch things as at that time ſhall be proponed to them.

In purſuance of this ordinance, the director gives out precepts, or brieves; whereof I ſhall inſert one, directed to a bailie, all the reſt being of the ſame tenor, and differing in nothing but in the deſignation of the party to whom it is directed.

JACOBUS, Dei gratia, Rex Scotorum, Balivo ſuo de Cowall, et deputatis ſuis, ſalutem. Quia ex aviſamento et deliberatione noſtri chariſſimi conſanguinei ac gubernatoris, ac dominorum noſtri concilii, ordinavimus parliamentum noſtrum tenendum apud Edinburgum, et inchoandum tali die cum continuatione dierum; vobis præcipimus et mandamus, quatenus ſummoneatis, ſeu publice ſummoneri faciatis, omnes et ſingulos epiſcopos, abbates, priores, comites, barones, et cæteros libere-tenentes, totius baliæ veſtræ, et de quolibet burgo tres vel quatuor de ſufficientioribus burgenſibus ſufficientem commiſſionem habentibus, quod compareant coram nobis, dictis die et loco,

in dicto noſtro parliamento, una cum aliis regni noſtri prelatis, proceribus, et burgorum commiſſariis, qui tunc ibidem propter hoc intererunt congregati, ad tractandum, concordandum, ſubeundum, et determinandum ea, quæ in dicto noſtro parliamento, pro utilitate regni noſtri et reipublicæ tractanda fuerint, concordanda, ſubeunda, et determinanda; et vos ſitis ibidem dicto die, habentes vobiſcum ſummonitionis veſtræ teſtimonium, et hoc breve. Et hoc, ſub pœna quæ competit in hac parte, nullatenus omittatis. Datum ſub teſtimonio magni noſtri ſigilli, apud Edinburgum, penultimo die menſis Maii, anno regni noſtri ſecundo.

BALIVO DE COWALL PRO PARLIAMENTO.

This precept was under the teſtimony of the great ſeal in white wax.

Form

Form of the Brieve or Writ for calling a Parliament in Great Britain.

GEORGIUS Dei gratia, Magnæ Britanniæ, Franciæ et Hiberniæ Rex, Fidei Defenſor, Vicecomiti comitatus de Bute, ſalutem. Quia de aviſamento et aſſenſu concilii noſtri, pro quibuſdam arduis et urgentibus negotiis, nos, ſtatum et defenſionem regni noſtri Magnæ Britanniæ et eccleſiæ concernentibus, quoddam parliamentum noſtrum, apud civitatem noſtram Weſtminſter, decimo die Maii proximo futuri, teneri ordinavimus; et ibidem, cum prælatis, magnatibus et proceribus dicti regni noſtri colloquium habere et tractatum: tibi præcipimus, firmiter injungendo, quod, immediatè poſt debitam notitiam prius inde dandam, unum militem gladio cinctum, magis idoneum et diſcretum comitatus prædict. per liberè-tenentes ejuſdem comitatus, qui electioni hujuſmodi intererunt, ſecundum formam ſtatuti in eodem caſu editi et proviſi, eligi facias. Tibi etiam præcipimus, quod de quolibet regali burgo comitatus prædict.

unum commiſſionarium ad eligendum unum burgenſem pro claſſe ſive diſtrictu, de diſcretioribus et magis ſufficientibus, libere et indifferenter, juxta formam ſtatuti inde editi et proviſi, eligi facias. Et nomina eorundem militis et burgenſis, qui tibi forent retornata per clericos ad inde appunctuatos, in quibuſdam indenturis inter te et illos reſpective conficiendis, licet hujuſmodi eligentes præſentes fuerint vel abſentes, inſeri, eoſque ad dictos diem et locum venire facias. Ita quod idem miles et burgenſis plenam et ſufficientem poteſtatem habeant ad faciendum et conſentiendum his quæ tunc ibidem de communi conſilio dicti regni noſtri (favente Deo) contigerint ordinari ſuper negotiis antedictis; ita quod per defectum poteſtatis hujuſmodi, ſeu propter improvidam electionem militis et burgenſis prædictorum, dicta negotia infecta non remaneant quovis modo; nolumus autem quod tu, nec aliquis alius Vicecomes dicti regni noſtri aliqualiter, ſit electus. Et electiones illas quæ tibi forent certificatæ et retornatæ ut præfertur, nobis in cancellariam noſtram ad dictos diem et locum certifices, juxta formam ſtatuti,

una

una cum hoc breve. Teſte meipſo, apud Weſtminſter, 14to die Martii, anno regni noſtri octavo.

JEKYLL BALSTRODE.

Written on the tagg thus:

Vicecomiti comitatus de Bute, pro eligendo ad parliamentum decimo die Maii proxime tenendum.

JEKYLL BALSTRODE.

ESSAY III.

HONOUR. DIGNITY.

NO appetite in human nature is more univerſal, than that for honour or reſpect; which, conſidered as a tribute paid to intrinſic merit, is highly agreeable. But though all men are fond of reſpect, the bulk of men, unable or unwilling to purchaſe it at ſuch a price as real merit, endeavour to ſecure it to themſelves at a cheaper rate. Early attempts were made to annex it to lands and offices, and the law has been called in aid to ſupport the artificial connection. Thus, what ought to be a free-will offering, is changed to a matter of right. We lay claim to honour, as if it were our property, and as if, like land or goods, we were intitled to it by law. And the world has improved ſo much upon this indolent ſyſtem, that the different degrees of reſpect and honour are by cuſtom nicely adjuſted, both in language and behaviour;

" Qualities

" Qualities and virtues being aſſigned to " perſons of rank, under the titles of " *Graces*, *Excellencies*, *Honours*, and the " reſt of this mock praiſe and mimical ap- " pellation," as is happily expreſſed by an eminent author.

In a moral view, nothing is more pernicious than this artificial connection, as it robs worth and merit of their proper reward, to annex it to the goods of fortune, which, independent of it, have but too great influence. But conſidering the matter politically, the eſtabliſhing artificial marks of worth, which every one can diſcern, may be juſtified. Government could ſcarcely ſubſiſt without them. Real merit is ſo remote from vulgar apprehenſion, that were rulers to be choſen by that ſtandard, differences and diſſenſions would be endleſs.

However this be, here ariſes a diſtinction betwixt reſpect beſtowed from the opinion of merit, which may be called *natural honour*, and reſpect beſtowed upon the poſſeſſors

poſſeſſors of power and riches, which may be called *artificial honour*.

Though, among the ancients, this artificial honour was not carried ſo far as at preſent, we have however in old Rome one remarkable inſtance of it. To thoſe only who had borne a curule office, it was permitted to exhibit themſelves to poſterity by a ſtatue or portrait. Theſe accordingly, as denoting the number of curule offices that had been in a family, were authentic marks of honour or dignity. Hence a diviſion of the people into *Nobiles*, *Novi*, and *Ignobiles*. He who had the ſtatues or portraits of his anceſtors, was termed *Nobilis*; he who had only his own, *Novus*; he who had neither, *Ignobilis*: *Jus imaginis* therefore, among the old Romans, reſembled the right of bearing a coat of arms among us.

But this artificial honour grew to a greater height in courſe of time. Beſides its connection with the higher offices in the ſtate, as among the Romans, it came to be annexed

ed to large territories, and at laſt reſted upon families, without regard to land or office. This was the progreſs in all the Gothic conſtitutions; and this progreſs I ſhall endeavour to trace, as it tends to explain our preſent notions of dignity and honour.

In theſe Gothic conſtitutions, honour and dignity were originally annexed to land or office; and in no caſe to perſons or families, independent of land or office.

Earl or Count was the name given to the governor of a province. The office being of great power and authority, could not fail to have a conſiderable ſhare of dignity annexed to it. Baſnage, in his *Cuſtoms of Normandy*, obſerves, that counts were the ordinary judges of provinces; that under Charles the Simple, they began to be hereditary; and that ſome few of them uſurped the ſovereignty. In the ſame way an earl in England was the judge or governor of a ſhire, and his office as well as dignity was for life only. William the Conqueror firſt made

made the office feudal and hereditary, allotting for the fees of the office, the third penny of all the pleas determined in the ſheriff's court. This acceſſion of wealth and dignity had the ordinary effect. Earls became too great to ſubmit to the fatigue of buſineſs. Deputes were appointed in every county, upon whom was devolved all the drudgery work of the magiſtrate and judge. And thus it commonly happens, that the perſon who reaps the profit, does nothing; while the perſon who performs the work, is ſlenderly rewarded. After introduction of theſe *Deputes*, *Vicecomites*, or *Sheriffs*, an earldom was no long conſidered as a territorial office, but as a territorial dignity, which making a great figure, was a deſirable object. As it no longer had any relation to a real county or ſheriffdom, fictitious or imaginary counties were erected, in order to beſtow the title of *Earl* upon the poſſeſſors. And theſe titles, by the bounty of princes, came to be multiplied exceedingly; it being obſerved of ribands, titles, and ſuch like marks of diſtinction, which take nothing from the donor, that of all favours,

favours, they are beſtowed with the beſt grace. Rare invention, this, to reconcile, in ſo happy a manner, the intereſts of the giver and receiver.

It is obſerved above, that in the Gothic conſtitutions, honour and dignity were annexed to land as well as to office. In England a great eſtate held of the king, with power of juriſdiction, *&c.* and a *Reddendo* of ſo many knights to ſerve the king in his wars, commonly ſtyled *a Barony*, had dignity or honour annexed to it; and from this artificial connection, it alſo got the name of *an Honour*; the honour of Richmond, for example, of Woodſtock, *&c.* And the family here was ſo little regarded, that whoever purchaſed ſuch an eſtate, with the king's conſent, to be held of the crown, was, of courſe, conſidered as a baron, or perſon of honour.

Originally lands erected into an earldom or barony, were conceived to be ſo intimately united, as to become one ſubject, not capable of diviſion or ſeparation into parts.

parts. And hence, in the old law of England, it was a rule, that a barony could not be ſplit into parts, but that the whole behoved to be aliened together.

But this being a ſtrained conception, beyond nature, eſpecially where parts of an earldom or barony are locally ſeparated one from another, nature prevailed over art, and the diſpoſing of parts of a barony crept into practice.

For ſome time after this ſort of commerce was introduced, it had little influence on territorial honour. The earldom or barony ſtill remained in a great meaſure entire, with the dignity annexed to it. But when, by the arts of peace, and increaſe of induſtry, land became more univerſally the ſubject of commerce, readily paſſing from hand to hand, territorial honour behoved to be in an uncertain ſtate. Let us figure an earldom or barony poſſeſſed for ages by the ſame family: the family falling into decay, the eſtate is diſmembered piecemeal, till little or nothing is left. What

is

is become, in the mean time, of the dignity or honour annexed originally to the eſtate? For the eſtate being ſplit into ſmall parts, and poſſeſſed perhaps by mean perſons, the honour cannot follow any of the parts. Is the idea then loſt and gone? If it ſtill ſubſiſt, where is the object? The anſwer is, That it is transferred from the eſtate to the family. And the tranſition is eaſy and natural: For though poſſeſſion of the earldom or barony was the cauſe of the reſpect paid to the family, yet the family being the immediate object, is reſpected by the vulgar without conſideration of the legal title, and conſequently is reſpected even after the title is gone. Thus, in Germany, territorial titles of honour are communicated to every branch of the family, though poſſeſſed of no land-property; and therefore it is not wonderful, that, in Britain, the title ſhould remain with the chief branch of the family after the eſtate is gone.

One thing did facilitate the transferring of honour from land to families. It was

Malcolm Canmore, who, in imitation of William the Conqueror, introduced the territorial dignities of Earl and Baron, which produced ſirnames, not formerly in uſe: *Malcolmus Tertius, ſublato Maccabæo tyranno, regnum legitime ſibi debitum occupavit; quod ut ornaret, unicâ curâ incubuit: tunc et a prædiis nobilibus nomina quiſque ſumpſit, et cum magna frequenſque nobilitas S. Margaretam ex Hungaria & Anglia ſecuta, in Scotia conſediſſet, ſplendorem novo ſuo principatui additurus, Barones et Comites creavit*; *Dempſter*, *p.* 120. The uſe of ſirnames had undoubtedly the effect to make a more intimate union among the ſeveral parts of the compound idea of a family, by binding all theſe parts together under one common name; which tended to facilitate the connection betwixt a family and a title of honour, and made it as eaſy for the mind to reſt upon a family for the object of honour, as upon an eſtate.

It will be obvious, that this change in the nature of honour, from territorial to perſonal, behoved to be gradual. Notwithſtanding

ſtanding frequent inſtances of the title remaining with a family after the eſtate was diſmembered, the caſe would be different, where the earldom or barony was diſpoſed of whole and entire; for there the honour, for many ages, was certainly transferred with the eſtate. Oppoſite inſtances behoved to breed a confuſion and darkneſs in the idea of honour, being ſometimes applied to land, ſometimes to families independent of land. The matter is ſettled by courſe of time. The notion of territorial honour is quite worn out, and at preſent we have no example of honour, but what is perſonal, and annexed to families independent of land. I have heard of no exception in this iſland, unleſs it be with relation to the caſtle of Arundel, which at the ſame time appears to be a doubtful inſtance.

Though territorial honours be now at an end, there remains one remarkable conſequence of them, which is in full force. It is a maxim in law, That the king is the fountain of honour, and that it is the prerogative of the crown, to beſtow honours and dig-

nities of all kinds. It is not difficult to come at the foundation of this prerogative. Though it be the privilege of every ſuperior, to unite diſcontiguous lands into one artificial ſubject, in favour of his vaſſal; the king is the only ſuperior who can unite lands into an earldom or barony; for a plain reaſon, That it is not called an earldom or barony, unleſs it be held of the king. The honour which followed this erection or creation flowed from the king, conſequentially at leaſt; and as the king's conſent in the quality of ſuperior, is requiſite for tranſmitting an earldom or barony to a purchaſer, hence the king came to be conſidered as the fountain of territorial honour, in the ſame manner as he is the fountain of official honour, by his power of appointing the officers of the crown. Taking the matter ſtrictly, it was not the king who beſtowed the honour, but the people. Nothing flowed from the crown, but the office, or the barony, which carrying great power and pre-eminence, was naturally attended with honour and reſpect. And ſuppoſing honour to be a legal acceſſory of a barony, or office, it will not follow, that the

the king can create honour, independent of a barony or office, which would be creating an acceſſory without a principal. But our forefathers were by no means accurate in their conceptions: from the king's power of beſtowing the means of acquiring honour, to infer a power of beſtowing honour independent of theſe means, is no better reaſoning, than to infer a man's power of beſtowing knowledge without any means, from his power of beſtowing riches, which are one good means to acquire knowledge. Yet upon this, and no better foundation, is the king's prerogative built, of beſtowing perſonal or family honours, when theſe, by degrees, came to be ſubſtituted in place of the other.

And thus a new diſtinction was, by degrees, introduced, betwixt honour annexed to land, or office, and honour annexed to perſons, whether a ſingle perſon or a family. And this latter ſort of artificial honour, I ſhall take the liberty hereafter to call *perſonal honour*, though very different from that reſpect and deference which is volun-

tarily paid to certain perſons, from the opinion of real worth.

There are preſerved in England many old charters of the creation of earls, which uniformly run in the ſtyle of a grant of an office. When by the multiplication of earls beyond the number of ſheriffdoms, an earldom ſunk down to a territorial dignity, theſe charters were varied, and accommodated to the erection of lands into an earldom, in favour of the grantee and his heirs, which of courſe beſtowed upon him the territorial dignity. Afterwards, when the notion of perſonal honour crept in, certain ſolemnities were ſuperadded to the erection of the lands into an earldom, ſuch as girding the proprietor with a ſword, covering his head with a cap of honour and circle of gold, all of them marks of perſonal reſpect. And now, both in England and Scotland, the notion of territorial honour having vavaniſhed, an earl's patent is ſo framed, as to import perſonal dignity merely, without relation either to office or to land.

With regard to Scotland, the oldeſt creation

tion of an earl I have ſeen, is of Ranulph Earl of Murray. King Robert I. grants certain lands to him, and to the heirs-male of his body, to be held of the crown *in libero comitatu*. As no other form or ceremony was uſed in creating this gentleman an earl, the charter is full evidence, that in thoſe days the title of an earl was conſidered as merely a territorial dignity. A copy of the charter is annexed for the ſatisfaction of the curious. Another charter I have read of, by King David II. " in favour of Sir " Malcolm Fleming, Knight, and of the " heirs-male of his body, for his homage " and worthy ſervices, of the lands of " Farynes, Deall, Rynos, and the burgh " of Wigtoun, with their whole per- " tinents, and all the king's lands of the " whole ſheriffdom of Wigtoun, with the " advocation of the churches, and right of " patronage of the monaſteries and abbacies " exiſting within the ſheriffdom; reſerving " to his Majeſty the right of patronage of " the epiſcopal ſee of Whytehorn or Gal- " loway. And alſo becauſe the ſaid place " of Wigtoun was looked upon as the

" principal

" principal manor of the whole ſheriffdom " of Wigtoun, the king ordained, That " the ſaid Malcolm and his heirs ſhould " for ever take the name of *Earl*, and be " called the *Earls of Wigtoun*. Further, " the ſaid lands are erected into a free re- " gality, with power to judge upon the " four articles of the crown. The ſaid " earl and his heirs giving the ſervice of " five knights or ſoldiers to the king's ar- " my. Dated at Airth, 9th November, " 1343." This creation of the Earl of Wigtoun I have choſe the rather to men- tion, becauſe of one notable circumſtance, which demonſtrates the notion entertained in thoſe days of this dignity, that it was merely territorial, and went along with the lands to the purchaſer, in the ſame manner that the dignity of a baron by tenure did. Upon the 16th July, 1371, a charter is granted by Thomas Fleming Earl of Wig- toun, to Archibald of Douglas, knight of Galloway, " whereby, for the feuds be- " twixt him and the great men and inha- " bitants of the earldom of Wigtoun, and " for 500 l. Sterling paid him, he diſpones

" to

" to the ſaid Archibald the foreſaid earl-
" dom, with the pertinents." This charter was confirmed by Robert King of Scotland, 8th February, 1371. After this alienation of the earldom, Thomas Fleming was no longer conſidered as an earl; of which, among other writs, the following charter is full evidence, granted by Robert II. in which " he confirms a charter granted by
" the ſaid Robert Fleming, deſigned *Laird*
" *of Fulwood*, to William Boyd, of a wad-
" ſet of all the ſaid Thomas Fleming's
" lands within the barony of Lenzie, for
" 80 l. Sterling." The principal charter is dated at Cumbernauld, 1372, and the charter of confirmation, at Kinghorn, 20th June, 1375. Further, that the ſaid Archibald Douglas knight of Galloway, did, after the purchaſe of the earldom, take upon him the title of *Earl of Wigtoun*, appears by a charter of confirmation, ſtill extant, granted by him to Chriſtian Ramſay, of the lands of Balencreif and Gosford, dated 6th March 1422, which runs thus: *Omnibus hanc chartam viſuris vel audituris, Archibaldus de Douglas, Comes de Wigtoun, ac primogenitus*

primogenitus filius et heres magnifici et potentis Domini, Domini progenitoris noſtri, Domini Archibaldi Comitis de Douglas, Domini Galwidiæ et vallis Annandiæ, ſalutem, &c.

In Scotland, as well as in England, we can trace the dignity of an earl through its different changes. It was at firſt, as above laid down, merely territorial, annexed to the property of the earldom, and transferred with it to every purchaſer. Thereafter, to perpetuate the dignity in a family, and to prevent the ignominy of its being ſaleable, it came into practice, not only to erect the lands into an earldom, as formerly, but alſo to create the proprietor an earl; in order that he, and his heirs named in the grant, ſhould for ever enjoy that title and dignity. And at laſt the dignity became entirely perſonal, being given by patent to the patentee, and his heirs named, without relation to land. As theſe changes were influenced by opinion, without any eſtabliſhed regulation, we muſt expect much fluctuation of practice among the different forms,

in

in their progreſs from the one extreme to the other. In particular, territorial earldoms ſubſiſted long after the mixed form was introduced, and probably even after the introduction of patents, making the dignity purely perſonal. I ſay, probably; becauſe, as we know hiſtorically, that many patents have been granted which are not upon record, we muſt in ſome meaſure be uncertain about the æra of the firſt patents. With reſpect to the territorial dignity, we have examples of it ſo late as the 1581. There are two charters upon record, copies of which are annexed. The firſt, dated *anno* 1481, contains a grant of the earldom of Athol to John Stewart, Knight, by virtue of which grant, he is the ſame year inſerted in the parliament-roll as Earl of Athol. The other, dated 22d April 1581, contains a grant of the earldom of Arran to Captain James Stewart; and, in virtue of that grant, he, as Earl of Arran, is named one of the commiſſioners for holding the parliament, 26th of October 1581. Of the mixed form we have one clear inſtance, as far back as the 1488, in a charter granted that year to Patrick

Patrick Lord Hails, erecting his lands of Bothvile into an earldom; and at the ſame time creating him an earl, by the form of belting, in order that he, and his heirs for ever, ſhould be called *Earls of Bothvile*, and enjoy the dignity of an earl. A copy of this charter is alſo annexed.

From a charter upon record, granted by Charles I. to the Earl of Glencairn, it might be thought that patents were introduced into Scotland as early as the reign of James III.; for that charter ratifies letters-patent *anno* 1488, creating the Earl's anceſtor an earl. But upon reflection it will be found, that this charter affords no evidence of the antiquity of what is properly termed *a patent of honour*; becauſe charters are *literæ patentes*, as oppoſed to *literæ clauſæ*, no leſs than patents are. And the following facts make it probable, that the letters-patent referred to in this charter, were no other than a charter erecting the eſtate of Glencairn into an earldom.

The Earls of Eglintoun and Caſſilis having,

ving, *anno* 1606, obtained a decree of the ſecret council, preferring them in the order of parliament before the Earl of Glencairn, the latter, *anno* 1610, obtained a decree of the court of ſeſſion, reducing and annulling the ſaid preference, for the following reaſon: "That the purſuer's predeceſſor "was created Earl of Glencairn by James "III. in the month of May 1488, before "which time the defendants cannot ſhow "that the dignity of an earldom was grant-"ed to either of them." And to verify this reaſon, a charter and infeftment was produced, granted by James III to the Earl's predeceſſor, bearing date as aforeſaid, in the month of May 1488. This charter is not found on record; but as it was never the practice to give infeftment upon a patent of honour, it is highly probable, that this infeftment was in the uſual form, of erecting the eſtate of Glencairn into an earldom.

The firſt inſtance we can diſcover of an earl created by a patent, is that of Gilbert Lord Kennedy, created Earl of Caſſilis. For

though the patent be loſt, yet that he muſt have been created by patent, appears as follows. In the records of the lords of council, David Lord Kennedy, 7th of Auguſt 1509, appears as procurator for the Laird of Bargeny, to anſwer to the tenants of Cumnock, and to their ſummons made upon the ſaid Laird. And upon the 17th of November, the ſame year, mention is made of an action purſued by David Lord Kennedy, now Earl of Caſſilis, againſt John Shaw, *&c.* And that he was not created an earl by erecting his lands into an earldom, appears clearly from the following charters of the family, down to the year 1642, in which the lands of Caſſilis are always denominated a barony, and never an earldom. In the ſaid year 1642, and no ſooner, was the barony of Caſſilis erected into an earldom.

We now proceed to a more particular examination of the dignity of Lord Baron. In England, three ſorts of barons are taken notice of by writers; barons by *tenure*, barons by *writ*, and barons by *creation* Barons by tenure are they who derive their dignity

dignity and privileges from their lands, the ſame who are deſcribed above, under the name of *territorial barons*. Barons by writ came to have a being after the ſmall barons and freeholders were exempted from attendance in parliament. The exemption was granted in England, as well as in Scotland, with a reſerved power to the king, to require the attendance of any of them in parliament, when he ſhould ſee cauſe. This was done by a ſpecial writ, directed by the king to the baron or freeholder, whoſe preſence was required, and who was not otherwiſe bound to attend the parliament. But as this writ, whether we conſider the nature or tenor of it, was fulfilled by the perſon's attendance in that particular parliament to which he was called, leaving him to enjoy his privilege of exemption from other parliaments, when the ſummons was not renewed, it doth not readily occur why this writ ſhould beſtow any degree of nobility, whether perſonal or feudal. And ſuppoſing it did, the perſon thus ſummoned to parliament was ſtill a baron by tenure; becauſe none could be ſubjected to this

ſummons, but thoſe who held of the king *in capite*. This diſtinction therefore is little to be regarded; and accordingly we have no traces of it in our Scotch antiquities.

Barons by patent are thoſe who are created by the king, *Barons and Lords of Parliament*. It is agreed among authors, that the firſt inſtance of this kind upon record is in the days of Richard II. who, in the year 1387, created John Beauchamp of Holt, Baron of Kiderminſter, and Lord of parliament. The patent is in the following words: *Rex, &c. ſalutem. Sciatis, quod, pro bono ſervitio quod dilectus et fidelis Miles noſter Joannes de Beauchamp de Holte, Seneſcallus Hoſpitii noſtri, nobis impendit, ipſum Joannem in unum Parium et Baronum regni noſtri Angliæ præfecimus, volentes quod idem Joannes, et hæredes maſculi de corpore ſuo exeuntes, ſtatum Baronis obtineant, ac Domini de Beauchamp et Barones de Kiderminſter nuncupentur. In cujus, &c. dat. 10. Octob. &c.*

I have given this patent at large, that the nature of the grant may be the better underſtood; and it merits attention, becauſe, by creating earls without relation to a county, and barons without relation to a barony, foundation was laid for a great change in the conſtitution of parliament, though the conſequence probably was not early foreſeen. The parliament was orginally compoſed of the king's vaſſals, and the king had no power to bring any perſon into parliament, who did not hold of him in chief. By the multiplication of earls beyond the number of counties, which was begun upon the fiction of erecting a caſtle, or a manor, into a county, and afterwards carried on without that form, the title of *Earl* came to be conſidered as a perſonal dignity; and now here was another perſonal dignity invented, by creating a man *a baron and lord of Parliament*; which, though it was probably at firſt beſtowed upon barons by tenure, came afterwards to be beſtowed upon all perſons indifferently, without regard to land. An earl originally was intitled to ſit in parliament, as the king's im-

mediate vaſſal, and a baron upon the ſame footing: but now, as the king, by gradually deviating from the original conſtitution, has acquired, by long uſe, the privilege of making an earl without a county, and a lord of parliament without a barony, it may happen ſome time hereafter, that the houſe of peers ſhall be filled with men who have little or no property in land. It muſt be acknowledged, that ſeldom has the peerage been beſtowed but upon men of opulent fortunes: but as the crown is under no reſtraint in this particular, we owe it more to the goodneſs of our ſovereigns, than of our conſtitution, that the houſe of lords is compoſed of members, who, if they be not entirely independent, have themſelves more to blame than their circumſtances.

Though the foregoing diploma is the oldeſt that is upon record, it follows not, that it is the firſt of the kind. The ſtyle of the diploma rather argues an eſtabliſhed practice, as it is not introduced with any preamble, importing a new dignity. At what time then, by whom, and upon what occaſion,

occaſion, this new claſs of peerage was invented, is uncertain. It may appear hard to be conceived at firſt view, what could be the intention of it. In the reign of Richard II. and for a long time before, none but the greater barons attended the parliament, the ſmall barons and freeholders appearing by their repreſentatives. Now, to what purpoſe could it be, to create a great baron, lord of parliament, who was intitled already to that privilege? And if the honour was deſigned for a ſmall baron or freeholder, it was ſufficient to call him to parliament, by a ſpecial writ. But when the matter is more attentively conſidered, there will be found probable reaſons for introducing this dignity. The commerce of land, begun ſome centuries before, was greatly increaſed in the 1387. A barony by tenure, which was originally a permanent dignity in a family, was no longer conſidered as ſuch, after frequent inſtances of the tranſmiſſion of theſe dignities from hand to hand, in the way of commerce. The dignity, which was conſiderable while it was confined to certain families, fell in its value, after it came

came to be expoſed to ſale, with the barony to which it was annexed. This made perſons aim at ſome external mark of honour, which ſhould be permanent in their families, as baronies had been of old. And this was effectuated, by creating them, and their heirs, barons, and lords of parliament: for here the dignity and privilege being beſtowed upon a family, and not upon land as formerly, was inherent in the family, and behoved to ſubſiſt ſo long as the family ſubſiſted. Nor did this invention require any great ſtretch of fancy: for, at this period, and before, the notion of perſonal honour had gained ground, by the frequent examples of earls created with a very ſlight relation to property.

In Scotland, where there has been all along a cloſe imitation of Engliſh cuſtoms, the dignity of lord of parliament was early introduced: at what preciſe period, we know not; we are only certain, that this dignity was poſſeſſed by many families, before the reign of our James I. The act ſo often mentioned, exempting the ſmall barons and freeholders

freeholders from attendance in parliament, is ſufficient evidence; ſince it contains a regulation, "That biſhops, abbots, priors, "dukes, earls, LORDS OF PARLIAMENT, "and banrents, be ſummoned to parliament "by ſpecial precept" Whether patents were originally uſed in the creation of our lords of parliament, is not certain. I incline to think they were not uſed, becauſe I have ſeen no ſuch patent before the days of James VI. Probably there was no other form uſed but what is contained in the records of parliament, bearing, that the king, in full parliament, created ſuch a man, and certain heirs mentioned, lords of parliament, and ordained him to be ſtyled *Lord A. B.* of *C. D.*; the ordinary form being to annex *Lord* to the ſirname, with the addition of the name of the eſtate, connected by the particle *of*; for example, Lord Lindſay of Byres, Lord Stewart of Ochiltree. I muſt further obſerve, that if lords of parliament were created among us without a patent, the ceremony muſt have been performed in parliament.

The

The barons by creation, called *Lords of Parliament*, were diſtinguiſhed in common language from the barons by tenure, by being called *Lords*, ſuch as, Lord Erſkine, Lord Borthwick, Lord Seaton, *&c.*; whereas barons by tenure were called *Lairds*; for example the Laird of Dundas, the Laird of Calder, the Laird of Luſs, *&c.* Becauſe there is no Latin word for a laird, the barons by tenure were called *Domini*, as well as the lords of parliament were: but then, to expreſs the difference, the following forms were conſtantly obſerved. If a laird, or baron by tenure, was meant to be expreſſed, it was in this manner, *Dominus de Calder*, *Dominus de Balwirie*, *Dominus de Luſs*, *&c.*: but lords of parliament were expreſſed by leaving out the article, thus, *Dominus Erſkine*, *Dominus Seaton*, *Dominus Borthwick*. For illuſtration's ſake, I have annexed a copy of the roll of the parliament 1471, containing, 1*mo*, A liſt of the biſhops who appeared in that parliament; 2*dly*, of the abbots; 3*dly*, of the earls; 4*thly*, of the lords of parliament; 5*thly*,

5thly, of the barons by tenure; and *laſtly*, of the commiſſioners for the boroughs.

There appears upon record a form of creating peers, different from any above mentioned. One remarkable inſtance is an act of the 7th parliament, James VI. *anno* 1581, bearing, That the lands of Doun, *&c.* were feued by Queen Mary to Sir James Stewart of Doun, Knight, his heirs, *&c.* ſubſuming, that the ſaid Sir James being deſcended of the royal blood, "therefore his Highneſs, with advice of his "three eſtates, erects, creates, unites, annexes, and incorporates, all and ſundry "the foreſaid lands, offices, and other particulars above written, in an *lordſhip*, "to be called in all time coming *the lordſhip of Doun*; decerning and ordaining the "ſaid Sir James, his heirs and ſucceſſors, "ſpecified in the infeftment, in all time "coming, to be called and intituled *Lords "of Doun*, who ſhall have the honour, "dignity, place and preheminence of a "lord of our Sovereign Lord's parliament, "in all parliaments, aſſemblies, and other "conventions,

" conventions, with his arms effeiring there-
" to; and giving unto him all honours,
" dignities and preheminencies, which per-
" tained, or of right and conſuetude ought
" to pertain, to a lord of parliament."

This form, it is preſumed, has been introduced, in imitation of the old form of creating an earl, by erecting his lands into a county. And hence the purpoſe and uſe of erecting lands into a *dominium* or lordſhip. Patents in this form may undoubtedly be granted by the king, as well as other patents. This, in favour of Lord Doun, was done in parliament for the greater ſolemnity, the king being at that time under age.

It is certain, that the lords of parliament had no greater power or privilege in parliament than the barons by tenure had; yet as it was underſtood to be the king's intention, in creating a lord of parliament, to exalt the perſon honoured to a rank above that of a baron by tenure, the nation has all along ſubmitted implicitly to the king's will,

will, as moſt nations do with regard to titles of honour beſtowed by the ſovereign. And there are two circumſtances which probably had an influence to heighten the reſpect paid in conſequence of ſuch creation. The attendance of a baron by tenure in parliament, is a ſervice, and not a matter of right; whereas, when one is created lord of parliament, the power of attending parliaments is beſtowed upon him as a privilege. The other circumſtance muſt have had ſtill a greater weight in the imagination. The honour of a baron by tenure was annexed to the land, and went with it to the purchaſer of the barony, along with the juriſdiction, and its other acceſſories. The frequent tranſmiſſion of baronies from hand to hand, with the honours annexed, could not fail to depretiate the dignity, in the opinion of all men. A man who, after paſſing many years in an obſcure rank, purchaſes an honour with his money, muſt lay his account, for ſome time, not to have great reſpect paid him. And though the reſpect paid to an old family, will run on a long time after the family-eſtate is gone; yet it

muſt dwindle by degrees, till the family at laſt be loſt in the common maſs. It will be obvious, from theſe conſiderations, that territorial honour could not long ſtand its ground after the commerce of land was introduced; and it will be equally obvious, that this circumſtance behoved to add a great luſtre to the dignity of a lord of parliament, which was annexed to the family, and inſeparable from it. Accordingly, after the lords of parliament were multiplied by frequent creations, the barons by tenure, who made no figure in compariſon, tired of the expence of attending parliaments, without any return either of profit or honour, withdrew by degrees. In later times, the barons by tenure who attended parliaments, were moſtly the eldeſt ſons of the nobility, infeft in lands, to intitle them to a ſeat there. And in fact, for forty years before the 1587, there is not to be found in the rolls of parliament, a ſingle inſtance of a baron by tenure attending in parliament.

It was in this year 1587, that the ſtatute of

of James I. of Scotland was revived, requiring the ſmall barons to ſend commiſſioners to parliament: and ſo little regard was had to barons by tenure in this act, that by an expreſs clauſe, "All freeholders of the "the king, under the degree of prelates "and *lords of parliament*, are to be warned "by proclamation to be preſent at the "chuſing of theſe commiſſioners." It was this act, then, which gave the finiſhing blow to barons by tenure, by depriving them of their ſeat in parliament, and thereby reducing them to the rank of ſmall barons and freeholders, who have no other privilege, but to ſend repreſentatives to parliament: and hence a *Scotch laird* has come to be in ſome meaſure a term of reproach, like a *French marquis*, or a *German baron*.

It remains only to be examined, by what means it happened, that the commerce of land, which has quite annihilated the honour of a baron by tenure, had not the ſame effect with regard to the dignity of an earl. It is clear from what is above ſaid, that both of them were once territorial dig-

nities, and that when the eſtate was aliened, the dignity went along with it. We may readily believe, that the dignity of an earl was pretty much obſcured, by this means, as well as that of a baron; and we have tradition to confirm us in this opinion. Yet after perſonal honour was introduced, whereby we came to ſeparate the dignity from the eſtate, the title of earl increaſed in repute, while that of laird, which was the title of a baron by tenure, dwindled away to nothing. When this matter is conſidered, a ready ſolution will occur The introduction of that new claſs of nobility, called *the Lords of Partiament*, which had the effect to overſhadow and obſcure the barons by tenure, plainly contributed to exalt the earls. Place and precedency work ſtrongly upon the imagination, becauſe they are public and palpable marks of reſpect. The barons by tenure, ſuch of them who had the greateſt eſtates, or made the moſt remarkable figure, were generally created lords of parliament; and ſome of them were more highly exalted, being made earls. The body of territorial barons being

ing thus impoveriſhed, by frequent draughts from it, came to be little reſpected. Theſe barons withdrew by degrees from parliament, as finding nothing there to anſwer the expence of attendance; and they were excluded altogether by the act 1587; which, in theſe circumſtances, could not, at any rate, be reckoned a hardſhip, and poſſibly was carried through with their conſent or good-liking. The removal of the barons by tenure from parliament, behoved to add a luſtre to the lords of parliament, and ſtill a greater luſtre to the earls, who took place of them. And as by this time an earldom was conſidered as a family-dignity, as well as was a baronage by creation, the earls could not fail to preſerve their ſuperior rank in the minds of the people, as well as they did in the rolls of parliament.

King Robert's charter to Randulph Earl of Murray.

ROBERTUS, Dei gratia, Rex Scotorum, omnibus probis hominibus totius terræ ſuæ, ſalutem. Sciatis, nos dediſſe, conceſſiſſe,

et hac præſenti carta noſtra confirmaſſe, Thomæ Ranulpho, Militi, dilecto nepoti noſtro, pro homagio et ſervitio ſuo, omnes terras noſtras in Moravia, ſicut fuerunt in manu Domini Alexandri Regis Scotiæ prædeceſſoris noſtri ultimo defuncti, una cum omnibus aliis terris adjacentibus, infra metas et diviſas ſubſcriptas contentis, incipiendo, videlicet, ad aquam de Spee ſicut cadit in mare; et ſic aſcendendo per eandem aquam, includendo terras de Fouchabre Rothenayks, Rothays et Bocharine, per ſuas rectas metas et diviſas, cum ſuis pertinentiis; et ſic aſcendendo per dictam aquam de Spee uſque ad marchias de Badenach; et ſic includendo omnes terras de Badenach et Kyncardyn, et de Glencarn, cum pertinentiis, per ſuas rectas metas et diviſas; et ſic ſequendo marchias de Badenach uſque ad marchiam de Louchabre; et ſic includendo terras de Louchabre, de Maymez, de Lezharketh, de Glengarech, et de Glenelg, cum pertinentiis, per ſuas rectas metas et diviſas; et ſic ſequendo marchiam de Glenelg uſque ad mare verſus occidentem; et ſic per mare uſque ad marchias boreales Ergadiæ, quæ eſt Comitis

mitis de Ros; et ſic per marchias illas uſque ad marchias Roſſiæ; et ſic per marchias Roſſiæ quouſque perveniatur ad aquam de Forne; et ſic per aquam de Forne quouſque perveniatur ad mare orientale: Tenendas et habendas dicto Thomæ, et heredibus ſuis maſculis de corpore ſuo legitimè procreatis ſeu procreandis, de nobis, et heredibus noſtris, in feodo et hereditate, in LIBERO COMITATU, ac in libera regalitate, cum quatuor querelis ad coronam noſtram regiam ſpectantibus; et cum omnibus placitis et querelis, tam in communibus indictamentis, quam in brevibus placitabilibus; et cum omnibus aliis loquelis quibuſcunque ad liberam regalitatem pertinentibus, vel aliquo modo pertinere valentibus, adeo liberè, quietè, plenariè, et honorificè, ſicut aliqua terra infra regnum noſtrum, in regalitate, liberius, plenius, quietius, aut honorificentius, dari poterit aut teneri; unà cum magna cuſtuma noſtra burgi de Invernis, et coketo ejuſdem, et libertatibus ſuis in omnibus, exceptâ tantummodo parvâ cuſtumâ dicti burgi; cum plenaria poteſtate attachiandi, accuſandi, et in omnibus miniſtrandi ac judicandi omnes

illas

illas dicti vicecomitatus injurias, dampna ſeu præjudicia facientes indebitè cuſtumæ prædictæ, adeo liberè in ominibus, ſicut nos vel aliquis miniſtrorum noſtrorum ipſos attachiare, accuſare, miniſtrare ſeu judicare potuimus, ſeu poterit, in præmiſſis; et quod dictus Comes, et hæredes ſui, amerciamenta, excaetas ſeu forisfacturas inde contingentes, adeo liberè et quietè habeant et poſſideant in futurum, ſicut nos, ſeu aliquis prædeceſſorum noſtrorum, dicta amerciamenta, excaetas ſeu forisfacturas, aliquo tempore habuimus. Quare vicecomiti noſtro de Invernis, et balivis ſuis, ac præpoſitis et balivis dicti burgi qui pro tempore fuerint, ac ceteris quorum intereſt, firmiter præcipimus et mandamus, quatenus præfato Comiti, et heredibus ſuis prædictis, ac ſuis miniſtris, ſint intendentes et reſpondentes, conſulentes et auxiliantes, ſuper his, ſi neceſsè fuerit, noſtra regali potentiâ invocatâ, ſine aliquo alio mandato noſtro ſpeciali interveniente. Volumuſque et concedimus, quod dictus Thomas, et heredes ſui prædicti, habeant, teneant, et poſſideant dictum comitatum, cum manerio de Elgyn, quod pro capitali manſione comitatus Moraviæ

raviæ de cetero teneri volumus et vocari, et cum aliis omnibus maneriis, burgis, villis, thanagiis, et omnibus terris noſtris dominicis, firmis, et exitibus infra prædictas metas contentis, cum advocationibus eccleſiarum, cum feodis et forisfacturis, cum ſilvis et foreſtis, moris et mareſiis, cum viis et ſemitis, cum aquis, ſtagnis, lacubus, vivariis, et molendinis, cum piſcationibus tam maris quam aquæ dulcis, cum venationibus, aucupationibus, et avium aëriis, cum omnibus aliis libertatibus, commoditatibus, ayſiamentis, et juſtis pertinentiis ſuis, in omnibus, et per omnia, tam non nominatis quam nominatis: quibus heredibus dicti Thomæ maſculis deficientibus, quod abſit, volumus, quod dictus comitatus ad nos, et heredes noſtros, liberè et integrè, ac ſine aliqua contradictione, revertatur. Volumus etiam et concedimus, pro nobis et heredibus noſtris, quòd omnes barones et libere-tenentes dicti comitatûs, qui de nobis et prædeceſſoribus noſtris in capite tenuerunt, et eorum heredes, dicto Thomæ, et heredibus ſuis prædictis, homagia, fidelitates, ſectas curiæ, et omnia alia ſervitia faciant, et baronias et tenementa ſua, de ipſo,

ipso, et heredibus suis prædictis, de cetero teneant: salvis tamen baronibus et liberè-tenentibus prædictis, ac eorum heredibus, juribus et libertatibus curiarum suarum hactenus justè usitatis. Volumus insuper et concedimus, quòd burgi et burgenses sui de Elgyn, de Fores, et de Invirnarne, easdem libertates habeant et exerceant quas tempore Domini Alexandri Regis Scotiæ prædicti et nostro habuerunt; hoc solùm salvo, quòd de nobis tenebant sine medio, et nunc de eodem Comite teneant, cum eisdem libertatibus. Salvo etiam nobis, et heredibus nostris, in hac donatione nostra, burgo nostro de Invirnes, cum loco castelli et terris ad dictum burgum pertinentibus, cum piscatione aquæ de Nis, et cum molendinis aquæ ejusdem, cum sequela dicti burgi, et terrarum ad ipsum burgum tantummodo pertinentium: et salvis nobis et heredibus nostris fidelitatibus episcoporum, abbatum, priorum, et aliorum prælatorum ecclesiæ Moravienſis, et advocatione seu jure patronatûs ecclesiarum earundem, et eorum statu, in omnibus quem habuerunt tempore Regis Alexandri prædicti, et aliorum prædecessorum nostrorum

rum Regum Scotiæ: excepto quod homines eorundem citati per nos ad defenſionem regni noſtri intendant vexillo, et ſequi teneantur vexillum dicti Thomæ Comitis, et heredum ſuorum prædictorum, unà cum aliis qui vexillum Moraviæ ſequi ſolebant antiquitùs: faciendo nobis, et heredibus noſtris, dictus Thomas, et heredes ſui prædicti pro dicto comitatu, ſervitium octo militum in exercitu noſtro, et Scoticanum ſervitium, et auxilium de ſingulis *davacis* debitum et conſuetum, tantummodo, ſine ſecta curiæ ad quamcunque curiam noſtram facienda. In cujus rei teſtimonium, præſenti cartæ noſtræ ſigillum noſtrum præcepimus apponi. Teſtibus Venerabilibus Patribus Willelmo Sancti Andreæ, Willelmo Dunkeldenſi, Henrico Aberdinenſi, Die gratia, Epiſcopis; Bernardo Abbate de Aberbrothock Cancellario noſtro, Malcolmo Comite Levenox, Gilberto de Haya, Roberto de Keth Mareſcallo Scotiæ, Alexandro Margus et Henrico de Sancto Claro, Militibus.

Diploma

Diploma of an Earldom, containing the form of Belting, &c.

JACOBUS, Dei gratia, Rex Scotorum, omnibus probis hominibus totius terræ ſuæ, clericis et laicis, ſalutem. Cum dilectus noſter conſanguineus Robertus Dominus Seytoun, ex clariſſima & illuſtriſſima ſtirpe vetuſtaque de Seytoun familia deſcenderit, quæ multis abhinc ſeculis per noſtros felicis memoriæ prædeceſſores optimo dominorum merito dignitatem et honorem liberi baronis et domini parliamenti regni noſtri Scotiæ conſequuta eſt; cumque majores dicti conſanguinei noſtri, in omni officio et fidelitate verſus nos et prædeceſſores noſtros firmiter permanſerint; idemque conſanguineus noſter anteceſſorum ſuorum merita non ſolum adæquaverit, ſed etiam eximiis ſuis virtutibus ita de nobis meritus ſit, ut regalis noſtri ſtatus ac muneris dignitas et munificentia poſtulent ne patiamur eum et ſucceſſores ſuos meritis honoribus et claritudine deſtitui, ſed potius ut egregie factis honor etiam et claritas accedat; Noveritis igitur

igitur nos, de conſilio procerum, et digni regni noſtri primatum, exigentibus præmiſſis, creaſſe, ordinaſſe, conſtituiſſe, et erexiſſe, tenoreque præſentium creare, ordinare, conſtituere, et erigere antedictum conſanguineum noſtrum Robertum Dominum Seytoun, et heredes ſuos maſculos, Comites de Wentoun; eidemque Roberto, ac heredibus ſuis prædictis, nomen, ſtatum, gradum, titulum, honorem, et dignitatem Comitis de Wentoun, in omnibus et ſingulis præeminentiis, dignitatibus, honoribus, et ceteris quibuſcunque ejuſmodi ſtatui Comitis de Wentoun pertinere ſeu ſpectare valentibus, damus et concedimus: ipſumque dictum Robertum, et heredes ſuos prædictos, hujuſmodi ſtatu, gradu, titulo, honore, et dignitate Comitis de Wentoun, per cincturam gladii, ac unius cappæ honoris, et dignitatis, et circuli aurei circa caput poſitionem, inſignivimus, inveſtivimus, et realiter nobilitavimus. Tenend. et habend. nomen, ſtatum, titulum, gradum, honorem, et dignitatem Comitis de Wentoun prædicti, cum omnibus et ſingulis præeminentiis, honoribus, et ejuſmodi ceteris quibuſcunque ſtatui Comitis

de Wentoun pertinentibus, ſeu ſpectantibus, præfato Roberto Comiti de Wentoun, et heredibus ſuis prædictis, in omnibus et ſingulis parliamentis noſtris, heredum et ſucceſſorum noſtrorum, publiciſque conventionibus et comitiis, infra dictum noſtrum regnum Scotiæ tenendis; necnon ut habeant ejuſmodi voces, præeminentias, dignitates, ſtatus, honores, et loca, in omnibus, quæ aliquis comes dicti regni noſtri ante hæc tempora melius, honorificentius, et quietius habuit, ſeu uſus gaviſus fuit, vel in præſenti gaudet et utitur: et quod dictus Robertus, et heredes ſui præfati, ſucceſſive vocitentur et nuncupentur Comites de Wentoun perpetuo in futurum, et quilibet eorum vocitetur et nuncupetur; ac ut comites parliamenti, et regni noſtri antedicti tractentur, teneantur, et reputentur, ac quilibet eorum ſucceſſive tractetur, teneatur, et reputetur. In cujus rei teſtimonium, præſentibus manu noſtra ſubſcriptis, magnum ſigillum noſtrum appendi mandavimus. Ex arce noſtra Sancruciana, die decimo ſexto Novembris, anno Domini milleſimo ſexcenteſimo, coram his teſtibus, prædilectis noſtris conſanguineis

conſanguineis et conſiliariis, Joanne Marchione de Hamilton, Comite Arraniæ, Domino Evan, &c.; Joanne Comite de Montroiſs, Domino Graham, &c. Cancellario noſtro; Georgio Mariſcalli Comite, Domino Keyt, &c. regni noſtri Mariſcallo: dilectis noſtris familiaribus conſiliariis, Domino Jacobo Elphinſton de Barntoun, Milite, noſtro Secretario; Ricardo Cokburne juniore, de Clerkintoun, noſtri Secreti Sigilli Cuſtode, Milite; Magiſtro Joanne Skene, noſtrorum Rotulorum, Regiſtri, ac Conſilii, Clerico; Domino Joanne Cokburne de Ormeſtoun, Milite, noſtræ Juſticiariæ Clerico; Magiſtro Willelmo Scot de Elie, noſtræ Cancellariæ Directore.

Jacobus R.

Diploma of an Earldom of a later date, without any of the above forms.

Anna, Dei gratia, Magnæ Britanniæ, Franciæ, et Hiberniæ, Regina, Fideique Defenſor: Omnibus probis hominibus,

ad quos præſentes literæ noſtræ pervenerint, ſalutem. Quandoquidem nos, regio noſtro animo perpendentes, nos noſtroſque regios anteceſſores perplurima fidelia ſervitia a nobili et antiqua familia de Argyle accepiſſe, toties agnota in diplomatibus, aliiſque magni momenti commiſſionibus, et muneribus plurimis hac præclara familia ortis, conceſſa, et quæ non minus ſibi ipſis honorem, et patriæ commodum tribuendo, quam nobis noſtriſque regiis anteceſſoribus approbantibus, geſta fuere; benignè ſtatuimus, non ſolum ſervitiorum quæ hactenus egregiè præſtiterunt, memoriam retinere, ſed etiam eos ulterius excitare et animare, hæc facta proſequi et repetere, quæ nobis nunc placet remunerare, durabilem et inſignem regii noſtri favoris characterem conferendo, in fideliſſimum noſtrum Conciliarium Dominum Archibaldum Campbell, fratrem germanum Joannis Ducis de Argyle, ejuſque heredes poſtea expreſſos, qui muneribus ſibi hactenus commiſſis fideliter et diligenter functus eſt: Noveritis igitur nos, tanquam ſolus author et ſcaturigo honoris, feciſſe, conſtituiſſe, et creaſſe, ſicuti

nos,

nos, per has noſtras patentes literas, facimus, conſtituimus, et creamus, dictum Dominum Archibaldum Campbell, Comitem, Vicecomitem, et liberum Parliamenti Dominum, intitulandum et deſignandum Comitem et Vicecomitem de Iſlay, et Dominum Oranſay, Dunoon, et Arroſe, omni tempore futuro: Dando, concedendo, et conferendo, dicto Domino Archibaldo Campbell, et heredibus maſculis ex ſuo corpore procreandis, titulum, honorem, ordinem, gradum, et dignitatem Comitis, Vicecomitis, et liberi Parliamenti Domini, ut dictum eſt; cum plenaria admodum poteſtate et authoritate illi, ejuſque antedictis, eundem, cum omnibus et ſingulis prærogativis, præcedentiis, præeminentiis, et privilegiis eo ſpectantibus, poſſidere et frui, quibuſcum nos eundem Dominum Archibaldum Campbell, ejuſque antedictos, nobilitamus et inveſtimus; ſpeciatim vero cum libero ſuffragio in parliamento. Tenend. dictum honorem, ordinem, dignitatem, et gradum Comitis, Vicecomitis, et liberi Parliamenti Domini, cum omnibus prærogativis, præeminentiis, et privilegiis eo ſpectantibus, per eundem Do-

minum Archibaldum Campbell, ejuſque antedictos, de nobis, noſtriſque regiis ſucceſſoribus, in omnibus parliamentis, ordinum conventibus, generalibus conſiliis, aliiſque congreſſibus quibuſcunque, publicis ſeu privatis, in dicto regno noſtro, tam plenariè adeoque liberè, in omnibus reſpectibus, quam quivis alius comes, vicecomes, et liber parliamenti dominus, ſimili titulo, honore, et dignitate, cum univerſis privilegiis aliiſque ei ſpectantibus, uſus et gaviſus eſt, ſeu quovis tempore præterito, præſenti vel futuro, uti et gaudere poterit. Leoni porro armorum Regi, ejuſque fratribus fœcialibus, imperamus, ut præfato Domino Archibaldo Campbell, nunc Comiti de Iſlay, talia prioribus inſigniis ejus gentilitiis additamenta, qualia hac occaſione expediens et conveniens videbitur, dent et præſcribant. Et declaramus et ordinamus haſce noſtras patentes literas, magno noſtro ſigillo munitas, adeo validas et efficaces fore, dicto Domino Archibaldo Campbell, ejuſque antedictis, pro poſſidendo prædicto titulo, honore, et dignitate, ac ſi cum omnibus ritibus et ſolemnitatibus, ſimilibus occaſionibus per prius uſitatis,

uſitatis, ille ejuſque inveſtiti et inaugurati eſſent; quocirca diſpenſavimus, perque præſentes in perpetuum diſpenſamus. In cujus rei teſtimonium, præſentibus magnum ſigillum noſtrum appendi mandavimus. Apud aulam noſtram de Kenſingtoun, decimo nono die menſis Octobris, anno Domini milleſimo ſeptingenteſimo ſexto, et anno regni noſtri quinto.

Per ſignaturam manu S. D. N. Reginæ ſupraſcriptæ.

Diploma of a Lord of Parliament.

Carolus, Dei gratia, Magnæ Britanniæ, Franciæ, et Hiberniæ, Rex, Fideique Defenſor: Omnibus probis hominibus ſuis ad quos præſentes literæ pervenerint, ſalutem. Sciatis, quia nos conſiderantes dilectum noſtrum Dominum Jacobum Sandilands de St Monance, Militem, ejuſque prædeceſſores, præclaros et illuſtres viros, ac probos et fideles ſubditos, illuſtriſſimis noſtris progenitoribus eſſe et fuiſſe, et multa præclara obſequia

ſequia et ſervitia nobis, et noſtris præclariſſimis prædeceſſoribus RegibusScotiæ, eternæ memoriæ, in eorum emolumentum, ac reipublicæ dicti regni noſtri incrementum, omnibus temporibus retroactis, tam tempore pacis quam belli, præſtitiſſe; et nos, e regia noſtra et gratioſa beneficentia, volentes animum addi dicto Domino Jacobo Sandilands, ad inſiſtendum veſtigiis illuſtrorum ejus prædeceſſorum, quoad ſervitia et obſequia nobis, et poſteris noſtris, præſtanda, conferendo in eum titulum, dignitatem, et ordinem ſubſcriptam, tanquam ſpecialem teſſeram regii noſtri favoris, cum dictus Dominus Jacobus ex antiqua et ſplendida familia de St Monance oriundus ſit, cui pro præſente luculentæ opes ſuppetunt ad obeundum et fovendum ordinem et gradum Domini, infra dictum regnum noſtrum, omni tempore futuro: Igitur, pro diverſis aliis magnis reſpectibus, cauſis, et rationibus, nos moventibus, ex authoritate noſtra regali, et poteſtate regia, dedimus, conceſſimus, et diſpoſuimus, tenoreque præſentium damus, concedimus, et diſponimus, memorato Domino Jacobo Sandilands, ejuſque heredi-

bus

bus maſculis ex corpore ſuo legitimè procreatis, ſeu procreandis, titulum, ſtilum, gradum, locum, honorem, dignitatem, et nobilitatis ordinem, *Domini*; ac damus, concedimus, volumus, decernimus, et ordinamus, quod ille, ejuſque hæredes et ſucceſſores prædicti, indigitabuntur, deſignabuntur, vocitabuntur, et nominabuntur, *Domini de Abercrombie*, omni tempore futuro, cum loco et ſuffragio in omnibus publicis et privatis conventibus, parliamentis, ſimiliter adeoque liberè in omnibus reſpectibus ſicut quicunque alius liber dominus aut baro parliamenti infra dictum regnum noſtrum; una cum omnibus privilegiis, dignitatibus, et immunitatibus quibuſcunqe, ad ſimilem locum ſpectand. et pertinen.; cum poteſtate memorato Domino Jacobo, ejuſque heredibus maſculis antedictis, gaudendi et fruendi dicto ſtilo, loco, ordine, honore, et dignitate *Domini*, omni tempore futuro; cum omnibus præcedentiis, præeminentiis, privilegiis, immunitatibus, aliiſque commoditatibus, eo competentibus, in omnibus noſtris, et ſucceſſorum noſtrorum, parliamentis, conventibus, conſiliis, aliiſque locis,

locis, vel actionibus quibuſcunque, privatis ſeu publicis; ac utendi, gaudendi, et fruendi jure ſuffragii, prærogativæ, gradus et loci, ac ſtatus domini et baronis, in omnibus, ſicut quicunque alius ejuſdem ſtatûs gaviſus eſt, et poſſedit, aut de præſenti poſſedit et gaudet; quodque dictus Dominus Jacobus, ejuſque heredes maſculi, et eorum ſinguli, ſucceſſivè deſignentur et indigitantur Domini de Abercrombie perpetuo; utque ſic reputentur, habeantur, et agnoſcantur, ac omni honore et reverentia dominis parliamenti competentibus afficiantur. In cujus rei teſtimonium, præſentibus magnum ſigillum noſtrum apponi præcepimus, apud Cariſbrook, duodecimo die menſis Decembris, anno Domini milleſimo ſexcenteſimo quadrageſimo ſeptimo, et anno regni noſtri vigeſimo tertio.

Creation of Patrick Lord Halis to the dignity of Earl of Bothvile.

IN parliamento excellentiſſimi Principis, ac Domini noſtri metuendiſſimi, Domini Jacobi

Jacobi Quarti, Dei gratia, Regis Scotorum illuſtriſſimi, tento apud Edinburgh, in prætorio ejuſdem, die Veneris, decimo ſeptimo die menſis Octobris, anno Domini milleſimo quadringenteſimo octogeſimo octavo, coram præfato ſupremo Domino noſtro Rege, ibidem perſonaliter ſedente.

Quo die, idem ſupremus Dominus noſter Rex, in eodem parliamento, præſentibus ſuis tribus ſtatubus, et cum eorundem conſenſu, favore, et conſilio, ſua regia Majeſtas recognoſcens, divino numine, ſe regni faſtigia et præeminentias, hereditatis jure, ſuſcepiſſe, idque ſui officii eſſe noſcatur viros nobiles qui ſuo honori, et reipublicæ dignitati, plurimum affuerunt, præmiis tollere, et ad altiores dignitates elevare, quo alii ſui ſubditi unius virtutem imitantes, ſe ad ſimilia præparent, et remunerationis officio diſponant; ſua, ea propter, ſacra Majeſtas regia, volens viros virtute præditos, regali munificentia et liberalitate, nobilitatis proprietate niteſcere, dominium de Bothvile fecit et erexit in unum liberum comitatum, pro perpetuo, futuris temporibus, Comitatum

tum de Bothvile nuncupandum; et dicto comitatui dominium de Creightoun; cum tenentibus, tenandriis, et libere tenentium ſervitiis, de Bothvile et Creightoun prædictis, una cum advocationibus et præſentationibus præpoſiturarum, præbendarum, et capellaniarum de Bothvile et Creightoun, una cum piſcationibus aquæ de Clide, et quadraginta mercatis terrarum Foreſtæ de Bothvile, cum omnibus aliis ſuis pertinentibus, dependentibus, juribus, et annexis, univit et incorporavit: Et eundem comitatum de Bothvile, cum dependentibus, annexis, et pertinentibus antedictis, ſuo dilecto familiari conſanguineo et conſuli Patricio Domino Halis, pro ſuo fideli legalitate, obſequio, et obedientia præſtitis; et, in compenſatione laboris et expenſarum, dampnii, vitæ et hereditatis periculi, ob regium honorem ſumptorum, pro regia ſerenitate, et reformatione juſtitiæ privorum conſilio oppreſſo, conceſſit et donavit in ſuo parliamento prædicto: eundem Patricium Dominum Halis in Comitem creavit, et Comitis titulo decoravit, per præcinctionem gladii, ut moris eſt; ita quod ipſe,

et

et ſui heredes, pro perpetuo, futuris temporibus, Comites de Bothvile vocentur, Comitiſque dignitate fulgeant.

Ratification of Alexander Earl of Glencairn's patent.

Carolus, Dei gratia, Magnæ Britanniæ, Franciæ, et Hiberniæ, Rex, Fideique Defenſor: Omnibus probis hominibus totius terræ ſuæ, clericis et laicis. Sciatis, quia nos compertum habentes, quod quondam noſter illuſtriſſimus attavus Jacobus Tertius, Dei gratia, Rex Scotorum, perennis memoriæ, per ſuas literas patentes ſub ſuo magno ſigillo, de data, apud Edinburgum, vigeſimo octavo die menſis Maii, anno Domini milleſimo quadringenteſimo octogeſimo octavo, expeditas, pro cauſis inibi ſpecificatis, dedit et contulit in quondam Alexandrum Comitem de Glencairn, Dominum Kilmaires, prædeceſſorem prædilecti noſtri conſanguinei Willielmi nunc Comitis de Glencairn, Domini Kilmaires, titulum, honorem, et dignitatem Comitis de Glencairn, Domini

Kilmaires, omni tempore affuturo nuncupandi, prout dictæ literæ patentes, de data prædicta, latius proportant; idque, secundum easdem, præfatus quondam Alexander Comes de Glencairn, suique successores, continuo, a data prædicta literarum patentium dictarum, honore et dignitate Comitis de Glencairn fruebantur, et sic per nostros nobilissimos progenitores in parliamentis, conciliis publicis, conventibus, et comitiis, æstimabantur; et nos memoria nostra recolentes bonum, gratum, et fidele servitium, nobis, et illustrissimis nostris prædecessoribus, per dictos Comites de Glencairn, suosque prædecessores, omnibus temporibus elapsis, absque aliqua violatione fidei aut interruptione, præstitum et impensum: Idcirco nos, nunc diu post nostram perfectam ætatem viginti quinque annorum completantur, et post omnes nostras revocationes, tam speciales quam generales, RATIFICAVIMUS, approbavimus, et confirmavimus, tenoreque præsentium, ex nostra scientia proprioque motu, ratificamus, approbamus, ac pro nobis et successoribus nostris, pro perpetuo confirmamus, præfatas literas patentes,

per

per dictum quondam Jacobum Tertium Scotorum Regem, ſub ſuo magno ſigillo, datas et conceſſas præfato quondam Alexandro Comiti de Glencairn de præfatis, titulo, honore, et dignitate Comitis, cum omnibus aliis literis patentibus, ſcriptis, et evidentiis, præfato quondam Alexandro Comiti de Glencairn, vel alicui ipſius prædeceſſorum aut ſucceſſorum, quoad attinet dictum honorem et dignitatem Comitis tantummodo, datis et conceſſis, in omnibus et ſingulis punctis, articulis, clauſulis, et circumſtantiis quibuſcunque: Ac volumus et concedimus, et pro nobis et ſucceſſoribus noſtris decernimus et declaramus, Quod hæc præſens noſtra generalis ratificatio eſt et erit tam valida, efficax, et ſufficiens, ac ſi prædictæ literæ patentes, de verbo in verbum, præſentibus inſerentur; quocirca nos diſpenſavimus, tenoreque præſentium diſpenſamus, nunc et in perpetuum: Præterea volumus et concedimus, ac pro nobis et ſucceſſoribus noſtris decernimus et declaramus, Quod præfatæ literæ patentes, factæ et conceſſæ per dictum quondam Jacobum Tertium, Scotorum Regem, dicto quondam Alexan-

dro Comiti de Glencairn, et hæc præſens noſtra ratificatio earundem ſunt et erunt validum, perfectum, et ſufficiens jus et titulus, unde præfatus Willielmus nunc Comes de Glencairn, heredes ſui et ſucceſſores, omni tempore futuro, libere, quiete, et pacifice, præfatis honore et dignitate Comitis, ſecundum validitatem prædictarum literarum patentium, fruentur et gaudebunt; et nos, per præſentes, in verbo principis, literas patentes ſupra ſpecificatas, et hanc præſentem noſtram confirmationem earundem, in proximo parliamento infra regnum noſtrum Scotiæ tenendo, ratificaturas et approbaturas fore, fideliter promittimus. In cujus rei teſtimonium, præſentibus magnum ſigillum noſtrum apponi præcipimus, apud Aulam noſtram de Oatlandis, vigeſimo primo die menſis Julii, anno Domini milleſimo ſexcenteſimo trigeſimo ſeptimo, et anno regni decimo tertio.

Per ſignaturam manu S. D. N. Regis ſupraſcriptam.

Roll

Roll of the Parliament 1471.

Die vero xviiii *Februarii,*
Præſente dicto Supremo Domino noſtro Rege, *una cum Epiſcopis, Abbatibus, Prioribus, necnon Nobilibus, Ducibus, Comitibus, Dominis, Baronibus, Libere-tenentibus, ac Burgorum Commiſſariis, ſubſcriptis, viz.*

Alexandro Duce Albaniæ, &c.

Epiſcopis
Dunkelden,
Aberdonen,
Roſſen,
Orchadeny.

Abbatibus
Aberbrothoc,
Melroſs,
Haliruidhouſe,
Paſleto,
Scona,
Driburgh.

Prioribus
Portmowok,
Roſtinot,
Coldinghame,
Mae.

Comitibus
Cancellarius,
Errol,
Merſhell,
Huntle,
Crawfurd,
Mortoun,

Comitibus
Ergile,
Rothes.

Dominis
Innermeth,
Erſkin,
Haliburton,
Setoun,
Borthwic,
Dernle,
Lindiſſay,
Gray,
Forbes,
Kilmawrs,
Kennedy,
Hamiltoun,
Monypenny,
Saltoun.

Baronibus
Sanquhar,
Bewfort,
Haltoun,
Craigmiller,
Leſtalrig,
Dundas,
Bargany,
Baſs,
Caldor,
Luſs,
Tariglis,
Elzetſtoun,
Ruthven,
Sauquhy,
Elphinſtoun,
Guthrie,
Torthorwald,
Corſtorphin,
Edmunſtoun,
Dalwolſy,
Bothiok,
Petarrow,
Abyrcrumby,
Erolet,
Ruſky,
Carns,
Cranſton,
Halkerſtoun,
Boyle,
Ker,
Gaſk,
Dron,
Hume,
Balcolmy.

Commiſſariis

Commiſſariis

Edinburgh, -	Zong, Boncle,
Aberdeen, - -	Knows,
Stirling, - - -	Wal. Stewart,
Linlichqw, - -	Fowlis, Forreſt,
Haddingtoun, - -	Girnlaw,
Dumfries, - -	Welch,
Are, - - -	Multrar,
Dundee, - -	Monorgund and Mal. Guthre.

ESSAY

ESSAY IV.

SUCCESSION OR DESCENT.

INTRODUCTION.

SUcceſſion, or the tranſmiſſion of eſtates from the dead to the living, is a ſubject which makes a great figure in hiſtory, as well as in law. It is a ſubject full of curioſity; for, depending moſtly upon remote principles in the imagination, it ſhows, in a multitude of inſtances, how much we are governed by feelings, which, abſtractly conſidered, appear to be of the weakeſt ſort. One effect of this indeed is, that there are no univerſal rules of ſucceſſion: different maxims are not only embraced in different countries, but have been eſtabliſhed in the ſame country at different periods; ſo that ſucceſſion, like the faſhion, has hitherto been in a conſtant fluctuation. We are apt to think, that the rules are now ultimately ſettled without fear of change. But ſo, in all probability, did our forefathers,

three

three or four centuries ago; for it is a common miſtake, from any ſhort ſpecimen, to infer a conſtant uniformity. However this be, it is of great uſe to trace the rules of ſucceſſion through their different changes. A lawyer poſſibly may think his ſtock of knowledge ſufficient, if he be acquainted with the rules which at preſent obtain in his own country. But a man muſt pierce deeper, if he would form any clear judgment about many old tranſactions of the greateſt importance. In the hiſtory of England, of France, of Scotland, and indeed of moſt European nations, we meet with frequent diſputes about the ſucceſſion of kingdoms, and of other ſovereignties, which we are altogether at a loſs to comprehend, becauſe ſuch diſputes exiſt not at this day. Who imagines that a ſecond ſon or daughter can have any pretenſions to a crown, ſo long as there are iſſue exiſting of the eldeſt? Yet this very thing was inſiſted on in the famous trial about the crown of Scotland, betwixt Bruce and Baliol. We are apt to imagine, that a ſecond ſon who makes ſo idle a claim, muſt have other arguments

guments to rely on, than what are founded on the laws of his country: not conſidering, that the right of repreſentation, though at preſent univerſally eſtabliſhed, was but creeping into practice in thoſe days. In former ages the right of repreſentation was not regarded; witneſs Lewis the ſecond ſon of Charlemain, called to the ſucceſſion of the crown of France when there was exiſting the ſon of an elder brother. Don Sancho, ſon of Alphonſo King of Caſtile, ſucceeded his father, and excluded his nephews, Alphonſo's grandſons by a former marriage. This was in the year 1284. Inſtances of this nature, and there is a multitude of them, make it evidently an eſſential qualification in a hiſtorian, to be acquainted with the laws and antiquities of the country he writes of. Is it not ſurpriſing, that Father Daniel, relating the foregoing event, in the hiſtory of France, paſſes it ſlightly over, without any obſervation, more than if it were a familiar incident? So dry an hiſtorian cannot fail to perplex his readers. Perhaps the father was himſelf perplexed, and choſe to hide his ignorance by

his

his ſilence. Rapin is a moſt judicious hiſtorian; but he is frequently at a loſs, through want of a ſufficient knowledge of the conſtitution of England. In his hiſtory are introduced many diſputed ſucceſſions, where the facts are ſtated with great accuracy: but an intelligent reader will perceive, that he is generally at a loſs when he endeavours to form a judgement about the point of right, which muſt be the caſe with an author who is not intimately acquainted with the notions of ſucceſſion entertained in the age and in the country he writes of. The following account is therefore given with a view to anſwer the purpoſes of hiſtory as well as of law.

PART I.

AFter property was recogniſed and firmly eſtabliſhed, the matter of ſucceſſion could not be long neglected. The proprietor's will would be acknowledged as of ſufficient authority to regulate his ſucceſſion

ceſſion*. And if the eſtate was left *in medio*, without a will to direct the ſucceſſion, the proprietor's children, for whom he was bound to provide, would naturally be ſuggeſted to

* I am aware, that while property was in its infancy, it was doubted whether a man's will, in whatever manner declared, could have the effect to regulate his ſucceſſion. When a piece of ground was taken out of the common, and cultivated by the occupier for the uſe of himſelf and family, it ſoon came to be ſettled, that this perſon was to have the undiſturbed poſſeſſion for his life; otherwiſe farewell to labour and induſtry. But as his intereſt in the ſubject behoved to die with himſelf, it was at firſt not readily conceived how his power over the ſubject ſhould continue after his intereſt was at an end, or at any rate ſubſiſt after he was dead and gone. This difficulty aroſe from the limited notion which originally was entertained of property. In early times property was not much diſtinguiſhed from what is now called *uſufruct*. No more was conceived in property, but the unlimited uſe of the ſubject. But experience pointed out a more extenſive idea of property. Mankind are fond of power, eſpecially over what is their own; and it came to be conſidered as an unreaſonable hardſhip, that the occupier ſhould not have the power of diſpoſal. This power was relished, and became law, becauſe it was every one's intereſt that it ſhould be law. And when once this power was underſtood,

to the mind. Hence the primary rule of ſucceſſion, that children ſucceed *ab inteſtato*. But what if there be no children? The ſpirit of the rule will apply to the neareſt relations: for after a man's death, his children, or other relations, will be conſidered as having a more intimate connection with his effects than ſtrangers; and, by a natural tranſition of ideas the property that was in the deceaſed, will be readily transferred to his kindred.

Children, as being the neareſt relations, come firſt under view. And with reſpect to

underſtood, it came by degrees to be extended the utmoſt length it was capable of. Thus Grotius, *lib.* 2. *cap.* 6. *ſect.* 14. *Poſſum enim rem meam alienare, non pure modo, ſed et ſub conditione; nec tantum irrevocabiliter, ſed et revocabiliter, atque etiam retenta interim poſſeſſione et pleniſſimo fruendi jure. Alienatio autem, in mortis eventum, ante eam revocabilis, retento interim jure poſſidendi ac fruendi, eſt teſtamentum.* Therefore, when we read of ancient laws among particular nations, introducing the power of making a teſtament, we muſt not conſider theſe laws as beſtowing peculiar privileges, but only as authoriſing a practice which was the conſequence of an enlarged idea of property.

them, a ſubtile queſtion occurs, Whether, by the law of nature, daughters are intitled to ſucceed equally with ſons? One thing is clear, that where-ever the notions of a family have got firm footing, female ſucceſſion muſt be excluded, ſince a woman, by marriage, making part of her huſband's family, cannot naturally carry on the idea of that of her father. But the notions of a family are derived from male ſucceſſion, and are not ſuggeſted by any natural principle. If we lay aſide the notions of a family, propinquity muſt alſo be laid aſide, which throws an equal weight into either ſcale. What, after this, readily occurs, to determine the queſtion, is, that women require food and raiment as well as men do, and are equally capable of enjoying riches. It is true, that among all nations, and at all times, the male has been eſteemed the *dignior perſona:* but this conſideration can never be of weight to thruſt out females altogether; and once admitting them to a ſhare, they muſt have an equal ſhare, as there are no poſſible *data* in this caſe to fix any other proportion.

This

This rule accordingly is obſerved among all nations, with regard to ſucceſſion in moveables. In moſt countries females have been excluded from ſucceeding to land. But this was the effect of diſtinguiſhing mankind into tribes and families, which, though not original in nature, crept pretty early in. It was evidently ſo among the Jews, and among the Romans, where the diſtinction betwixt different tribes was ſo remarkably preſerved, that by law a perſon of one tribe could not ſucceed to one of another. And in other countries, where theſe diſtinctions were not ſo much regarded, war in early times being the chief occupation, and land the chief object of conqueſt, it was natural that males only ſhould have the poſſeſſion of land, which they only could defend. But even in this caſe, it muſt be obſerved, that the whole ſons ſucceeded equally; which was departing as little from the law of nature as the circumſtances of the caſe would permit.

The right of primogeniture was a creature of the feudal law. The poſſeſſion,

not the property, of land, was given for perſonal ſervice; and when it came to be the practice to extend ſuch grants in favour of children, the maſter or ſuperior having no claim but to one man's ſervice, the eldeſt ſon came naturally into the father's place. For as in tracing out a family, the mind deſcends by degrees from the father, firſt to the eldeſt ſon, and ſo downwards in the order of age, the eldeſt ſon, where but one can take, is the firſt who preſents himſelf. And as the feudal law gained ground, and ſpred itſelf over all Europe the right of primogeniture came by degrees to be a general rule in the ſucceſſion to land-eſtates, which were held by military ſervice.

As this was evidently the reaſon for preferring the eldeſt ſon in a military feu, the ſame reaſon, in my apprehenſion, behoved to take place in burgage-land, which being given for the ſervice of watching and warding, naturally deſcends to the eldeſt ſon, if one only be bound to perform the ſervice. But ſoccage tenure ſtood upon a different footing. Where the poſſeſſion of land

land is given to a man, not for perſonal ſervice, but upon condition of delivering to the landlord yearly a certain quantity of corn, or of other fruits, which are the produce of the ground, there appears no good reaſon why the benefit of ſuch a contract, if there be any benefit, ſhould not accrue to all the family equally. And yet, ſo far as we can diſcover, ſons were always preferred to daughters in the ſucceſſion of ſoccage lands. All I have to ſuggeſt is, that in times of ignorance and barbarity, when ſtrength of body and perſonal courage are the only virtues, women are little regarded. And the practice of debarring them altogether from ſucceſſion to military feus, which made the bulk of the property of the nation, did probably pave the way for preferring the males to the ſucceſſion of other eſtates. This conjecture appears natural; but it is more difficult to be explained, by what means it happened, that the equal ſucceſſion of males in the ſoccage-tenure has gone quite into diſuſe, and given place to the right of primogeniture. This revolution is not taken notice of by our hiſtorians, nor ac-

counted for by our lawyers. One thing is certain, that equality among males, in the deſcent of ſoccage-lands, was in vigour ſo late as the *Regiam Majeſtatem.* See *R. M. l.* 2. *c.* 27. We muſt venture another conjecture here. After the days of David II. during whoſe reign the *Regiam Majeſtatem* was compiled, peaceable times brought on new manners. Riches came to be in greater requeſt than military proweſs, and many ſuperiors were willing to take rent in place of ſervice. This in ſome meaſure confounded the diſtinction betwixt military and ſoccage tenures, ſo as by degrees to make one rule ſerve for the ſucceſſion in both. And as military feus were by far the moſt frequent, the right of primogeniture, which took place in moſt caſes, became at laſt univerſal.

But we have yet other difficulties to ſtruggle with. Though the ſucceſſion to ſoccage-land came after this manner to be confined to the eldeſt ſon; yet no alteration was made in the female ſucceſſion. Females continued to ſucceed all equally, and do ſo at

at this day. This at firſt ſight muſt appear whimſical, and not readily explicable. If the right of primogeniture was ſo univerſal a principle, how came it to ſtop ſhort, and not to obtain in every caſe? And it is evident, where there are daughters only, that the mind, in tracing out the line, deſcends to the eldeſt, as naturally as to the eldeſt ſon where there are male iſſue. It is probable, that the ſoccage tenure was not far behind the military tenure in point of time; and if ſo, the rules of its ſucceſſion were ſettled before the right of primogeniture came to take ſuch faſt hold of the mind, as to be reckoned a ſort of natural principle. Accordingly we find, that though males were preferred in ſoccage-tenure, yet in other reſpects, the law of nature took place, by calling the males all equally; and failing them, the females. But the following circumſtance muſt be attended to, that though, in progreſs of time, the right of primogeniture came to be eſtabliſhed as a general law, and in ſome ſort as a natural principle; yet there was no example of this right taking place, except among males.

It

It was this very conſideration, in all appearance, which led our forefathers, in their ſuperficial reaſonings, to lean to the right of primogeniture in all caſes of male ſucceſſion, without thinking of incroaching upon the eſtabliſhed rules of female ſucceſſion: not at all attentive to what is fundamental in this matter, in the *firſt* place, that the right of primogeniture depended upon the nature of the military holding, which therefore could not, with any ſhew of reaſon, be extended to holdings of a different kind; nor, in the *ſecond* place, that if the privilege of primogeniture were to be the ſole rule, it ought to have place in the ſucceſſion of females, as well as of males.

After the feudal law came to a ſtandard, the ſucceſſion in military feus was regularly extended to the male deſcendents of the original vaſſal, and after theſe were all exhauſted, the fee returned to the ſuperior. There was no place for collateral ſucceſſion. It might happen, that collaterals to the deceaſed vaſſal did ſucceed; but it was not

not as collaterals, but as heirs-male of the body of the original vaſſal. See *l.* 2. *Feud. t.* 11.

In handling a ſubject where we have ſo few principles to direct us, and where theſe principles are not of the firmeſt ſort, it is not wonderful that difficulties croud in on every ſide. So far we have proceeded upon a reaſonable foundation, that in the ſucceſſion of military feus, preference is given to the eldeſt ſon But now the queſtion is, Whether the eldeſt ſon's male iſſue ought, in all events, to be alſo preferred? A military vaſſal dies leaving iſſue a younger ſon, and a grandſon by his eldeſt ſon; the doubt is, Whether the ſon or grandſon be heir? The ſon is undoubtedly the next in blood, and therefore, by the law of nature, ought to be preferred; and this accordingly appears to have been the law in the days of Charlemain, whoſe ſecond ſon Lewis was called to the ſucceſſion as lawful heir, though Charlemain had by his eldeſt ſon a grandſon, of perfect age when the ſucceſſion opened. On the other hand, the circumſtances

cumſtances of the grandſon are to be conſidered. He is born, and perhaps educated, with the proſpect of ſucceeding to the eſtate, after the death, firſt of his grandfather, and then of his father It cannot but be reckoned a hardſhip to be deprived at once of all his hopes, by the unexpected accident of his father's death before that of his grandfather. Such are the circumſtances which weigh one againſt the other; and therefore it is not ſurpriſing to find ſenſible writers taking different ſides in a queſtion ſo dubious. Perhaps there is not one queſtion in law, which hath afforded a greater field, not only for law-ſuits, but for bloody and cruel wars. Inſtances are frequent in the hiſtories of France and England: and the celebrated ſtruggle about the crown of Scotland, betwixt Bruce and Baliol, had no other foundation. Baliol was deſcended of the eldeſt ſiſter, Bruce of the ſecond. But then it was urged in behalf of the latter, that he was one degree nearer to the common ſtock than his competitor, and conſequently nearer in blood. This matter is now ſettled, and has been for ages, in favour of the deſcendents

ſcendents of the eldeſt: but it was reckoned a doubtful caſe, even ſo late as the time when the *Regiam Majeſtatem* was compoſed, as will appear from the 33d chapter of the ſecond book.

It has been diſputed, whether the ſame rule ought to hold in the ſucceſſion of collaterals. The ground of the doubt is, That as a man is never without hope of iſſue, none of his collaterals can be born or educated with the hope of ſucceeding to him. This circumſtance being removed, which preponderates in the former caſe, it may be thought, that there is nothing to weigh againſt the right of the neareſt agnate. Upon this ground it was, that after the death of Henry III. of France, the league ſet up the Cardinal of Bourbon as heir to the crown, againſt his nephew the King of Navarre, afterwards Henry IV For though Henry was the ſon of the elder brother, yet the Cardinal, the younger brother, was one ſtep nearer to the common ſtock It is extremely probable, had caſes of this nature firſt occurred, that the neareſt agnate would

would have been preferred; and it is equally probable, had this once been eſtabliſhed as the rule, though occurring only in collateral ſucceſſion, that it would have been applied to the caſe of deſcendents, without regard to their hope of ſucceſſion. But inſtances firſt occurring, as readily would happen, in the caſe of deſcendents, the deciſions given in favour of the eldeſt ſon's deſcendents, eſtabliſhed a ſort of general rule, which was afterwards applied to the caſe of collaterals.

Thus we ſee after what manner the rules of ſucceſſion have been eſtabliſhed, not only from very ſlender circumſtances, but in ſome meaſure from accident. Had the foregoing queſtion firſt occurred in collateral ſucceſſion, probably we ſhould never have heard of this privilege given to deſcendents, which lawyers call *the right of repreſentation*. But as this privilege was firſt eſtabliſhed in favour of deſcendents, it was held a general rule, and applied to the caſe of collaterals, though without the ſame foundation. But this will not be thought

thought ſtrange, when that natural propenſity is conſidered which prompts us to act by general rules, a propenſity ſo ſtrong as ſcarce with patience to regard any variation of circumſtance.

And here we have an opportunity to conſider a peculiar ſort of argument, the great reſource of lawyers, when they are preſſed with difficulties on any ſubject. Caſes frequently occur, which, being exceptions from the general rule, muſt be governed by a rule peculiar to themſelves: but as mankind are addicted to general rules, and as the indolence of lawyers makes it a taſk too hard for them to trace out all the rules which govern particular caſes, they have invented an eaſy method to bring all the exceptions under the general rule; which is, by ſuppoſing the fact to have happened otherwiſe than it did. And this they juſtly term a *fictio juris*. Thus, for example, in the Roman law, a citizen who was taken captive by the enemy, loſt the *jus civitatis*, and all the privileges attending it. This general rule was eſtabliſh-

ed among them. But ſuppoſing the captive to have made his eſcape, or to have recovered his liberty by ſome other lucky accident, it would have been an hardſhip intolerable, that this man, without a fault, ſhould be forfeited of all his rights and privileges. The rule, it is evident, could not be extended to this caſe. But what was to be done? for lawyers are loath to part with a general rule. Inſtead of making a rule for caſes of this nature, they extricated themſelves out of the difficulty, by ſuppoſing, forſooth, that this man had never been out of the city; and this is termed the *jus poſtliminii*. The Roman lawyers are full of ſuch fictions; and the moderns, their humble imitators, have followed them too faithfully. Thus, upon the ſubject under conſideration, it is juſtly eſtabliſhed as a general rule, that the next in blood ſucceeds. When the next in blood dies before the ſucceſſion opens to him, the privilege given to his deſcendents is obviouſly an exception from this general rule. But to ſupply this defect in the rule, the deſcendent is ſuppoſed, by a fiction of law, to come in place of the deceaſed,

deceaſed, to be as it were the ſame perſon with him, and intitled to claim the ſucceſſion, as he could have done had he been alive. Let us hear our countryman Craig upon this fiction: *Jus repræſentationis eſt, quoties poſterior, non ex ſua, ſed ex prioris perſona, quam repræſentat, jus ſucceſſionis petit; veluti, præmortuo filio, cum nepos aut neptis ad ſucceſſionem vocantur: non enim ratione ſui, ſed patris eorum, i. e. filii defuncti, ſucceſſio ad eos pertinet; neque hi ex ſua perſona hereditatem, aut ejus partem, poſſunt petere, ſed tantum ex perſona patris; (nam ex ſua non admitterentur, cum filii ex eodem parente ſuperſint, qui horum ſunt patrui, et ſic agnati propiores defuncti): et hoc eſt ejus perſonam repræſentare.* This, as has been obſerved, is a very commodious method of ſolving difficulties. But however commodious, I will venture to ſay, it affords little ſatisfaction to the mind. For the queſtion ſtill recurs, Why is this fiction introduced? Why ſhould there be a right of repreſentation as to lands, more than as to moveables? To ſay no worſe of it, it darkens inſtead of clearing the ſubject-matter. Is it not

more natural, and almoſt as eaſy, to ſet forth, in plain terms, the hardſhip it would be upon the eldeſt ſon's deſcendents, to be cut out of their hope of ſucceſſion by the premature death of their father; and that this conſideration in ſuch caſes prevails over the right of propinquity?

It remains only to be obſerved upon this head, that the foregoing plan of ſucceſſion, with reſpect to military feus, reſts upon three general rules: 1*ſt*, That the eldeſt male is the favourite of the law, and preferred to the ſucceſſion. 2*d*, That the eſtate gradually deſcends from the elder brother, failing iſſue, to the younger brothers. And 3*d*, That it deſcends to every one of the male iſſue of the elder brother, before it comes to the younger brother or his iſſue.

Though what is above ſet forth was the common courſe of ſucceſſion in military feus, we have, however, no reaſon to doubt that it was often varied by ſpecial deſtination. In ſtrict law the vaſſal's right

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is but an *uſufruct*, and it was late before he was conſidered as proprietor. The ſuperior therefore behoved to have a great ſway in chuſing an heir for his vaſſal; eſpecially in early times, before feus were regularly extended to heirs. That ſon, without regard to primogeniture, who was the moſt active in war, would often be preferred. And even in after-times, when ſucceſſion in feus was more firmly eſtabliſhed, examples could not be wanting of ſetting aſide the eldeſt ſon, becauſe of defects in body or mind; or perhaps becauſe he was intended for the church, or addicted to the arts of peace. This gave a beginning to entails, by altering the order of ſucceſſion, and preferring a younger ſon and his male deſcendents, to the elder ſons and their deſcendents.

But now ſuppoſing that a younger ſon, thus preferred to ſerve the ſuperior in place of his father dies without male iſſue, the queſtion is, Who is his heir in the feu, his elder brother or his younger? There will perhaps not be found in law, a ſpeculation

more curious, than what this doubt gives riſe to. Let us examine attentively what conſiderations occur upon this ſubject. As it is probable, from the circumſtances of the times, that examples of ſuch entails were frequent, even in the infancy of the Feudal law, we cannot well ſuppoſe, that the rules above laid down, touching the ſucceſſion to military feus, were very firmly eſtabliſhed, when there was firſt occaſion to determine the point under conſideration. But ſuppoſing theſe rules to be firmly eſtabliſhed, it muſt have been obvious, at firſt view, that they did not apply to this caſe. The right of primogeniture, and the gradual deſcent, relate only to the father's ſucceſſion; and extend no farther than to aſcertain, that where a man dies *inteſtate*, his eſtate goes firſt to the eldeſt ſon and his iſſue; whom failing, to the ſecond ſon and his iſſue; and ſo downwards. But there is nothing in this regulation, where a man dies without iſſue, to determine who ſhall be his heir, his elder or younger brother. Theſe rules therefore muſt be laid aſide, as of no uſe to ſupport the elder brother's claim.

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On the other hand, the will of the ſuperior or father, in excluding the eldeſt ſon, operates not in favour of the younger, ſince it goes no farther than to prefer the ſecond ſon to the eldeſt, by no means to prefer the third ſon. And at any rate, laying aſide the eldeſt ſon, becauſe of his unwillingneſs or incapacity, an excluſion which is founded merely on perſonal conſiderations, cannot be extended againſt his iſſue.

Theſe points being diſcuſſed, one thing occurs in favour of the elder brother. In order to aſcertain the propinquity, it is natural to lay hold of the principle which connects the brothers together, and this is their relation to their father. When we have carried our thoughts to him, we naturally deſcend to the eldeſt ſon, as the firſt ſtep in the progreſs of the mind through the family. And thus, as the eldeſt ſon comes next in view, after the connecting principle, it will not be ſtrange, in a curſory view of the matter, to prefer him, as a ſtep or degree nearer to the common ſtock than his competitor is. I ſhall have occaſion to ſhow hereafter,

hereafter, that this way of thinking had its effect in another caſe of ſucceſſion. But as, here, cuſtom has given the preference to the younger brother, there muſt be ſome other principle in our nature, or ſome peculiarity in our way of thinking, ſufficient to overbalance that now ſuggeſted: for things eſtabliſhed merely by cuſtom, without the influence of external circumſtances, muſt certainly have a foundation in nature.

In ſearching for this principle or peculiarity, let us premiſe one reflection. It will not be thought ſtrange, that the rules of ſucceſſion, derived chiefly from perſonal connections, ſhould, like theſe connections, reſt upon remote principles; principles which, at firſt ſight, may appear of little weight, which are little attended to, and which, notwithſtanding, have their effect by influencing the mind. And now to our ſubject; in order to explain which, we muſt take a pretty large compaſs, being to treat of things which are not the ſubject of common obſervation. In tracing out the actions of our mind, the following obſervations will

will be found juſt. *1ſt*, In viewing objects, we are diſpoſed to take them regularly in their order; and we cannot, without effort, jump from one at hand to one at a diſtance, neglecting thoſe that are intermediate. Whether this be the effect of a natural principle, or of habit, belongs not to the preſent ſubject. I ſhall only obſerve, that the progreſſive motion, through the points of ſpace, of all moving bodies, is ſufficient to bring on a habit, and to accuſtom the mind to the like progreſſive motion in ſurveying its objects. *2d*, We are not leſs influenced by the ſucceſſion of time than of place. We cannot eaſily be brought to contemplate an object diſtant in point of time, without running over the intermediate objects. *3d*, As the tendency of all bodies is to move in a ſtraight line, and in one direction, as nature is going on in its courſe without any retrograde motion, this tenor of things about us, communicates to our minds the like tendency. However this be, it is certain, that we more readily paſs to the contemplation of a future object, than of one that is paſt. The progreſſion of the thought, in going from

from a preſent to a paſt object, appears unnatural, as if we were walking backward: but when we turn our thought to a future object, our fancy flows along the ſtream of time, and arrives at the object, by an order which is agreeable, becauſe it is natural.

Theſe obſervations will give light to our ſubject. Let us recollect, that it is the eſtate of a middle brother which is in diſpute. If from him we turn our thoughts to the elder, we feel a ſort of retrograde motion, contrary to the courſe of nature; which, if not poſitively diſagreeable, is much leſs agreeable than the natural order of deſcending to the younger brother. This circumſtance weighs in favour of the younger brother. The tranſition of the thought to the younger, being more eaſy than the tranſition to the elder, gives an impreſſion of a more intimate connection or relation betwixt the ſecond and third brother, than betwixt the ſecond and eldeſt. For it is a law in our nature, that the connection among objects is ever conſidered to be in proportion to the facility

facility of the tranſition of our ideas from the one to the other.

It will perhaps be obſerved, that principles like what I have been tracing out, which at beſt make but a ſlender impreſſion, are little to be relied on, in our reaſonings upon any ſubject. I readily yield, that in reſolving the preſent queſtion, no man would heſitate a moment to divide the middle brother's eſtate betwixt the elder and younger, as the equitable method. But what forces us, perhaps reluctantly, into an abſtract ſpeculation, is the nature of a military feu, which admits not of a divided ſucceſſion. When ſo intangled, we muſt extricate ourſelves the beſt way we can. A deciſion muſt be given, for the competitors are calling out to have juſtice done them. And however ſlight the foregoing principle may appear, I muſt obſerve, that it had weight enough among our forefathers to preponderate every circumſtance which weighs for the elder brother. At leaſt, I will take it for granted, that this is the principle,

principle, till I hear of another capable to make a ſtronger impreſſion.

And thus a fourth rule came to be eſtabliſhed in the ſucceſſion of military feus, That its courſe is ever to deſcend, never to aſcend.

To proceed to other matters: I have explained above one effect of bringing land into commerce, which is that of introducing primogeniture into all ſorts of holdings. I ſhall now take notice of other effects of this innovation ſtill more remarkable. The Feudal law was an inſtitution adapted entirely to war, admirably contrived for that end: but it was an utter enemy to labour, and induſtry, and, even among an indolent people, ſcarce ſufferable in peaceable times. Such an inſtitution could not be long-lived. According to the circumſtances of the times, and humours of the people, various changes were introduced in different countries, all of them tending to correct its harſhneſs, and to ſoften it down to a milder temperament. In many countries it is quite annihilated; and

and even where it remains, it is reduced to a ſhadow. As land is one of the moſt deſirable objects, the Feudal law was unnatural in this reſpect, that it withdrew land from commerce, and afforded no means but military ſervice to come at the poſſeſſion and uſe of it. The hardſhip was not much felt in times of war: but after the arts of peace began to be cultivated, manufactures and trade to revive in Europe, and riches to increaſe, this inſtitution became extremely burdenſome. It firſt tottered, and then fell by its own weight, as wanting a ſolid foundation. All parties conſpired againſt it, even thoſe who were moſt intereſted to ſupport it. Superiors found they could turn their lands to better account, than to allot them for military ſervice. They were willing to change this ſervice for rent; and the tenants, prone to induſtry, or at leaſt fond of independency, were pleaſed with the exchange. Other ſuperiors, to ſupply means for luxury, and tempted with a price, were willing to give off detached pieces of land. And thus, by degrees, land returned to its original condi-

tion of being the principal ſubject of commerce.

This behoved to introduce ſome new regulations with regard to ſucceſſion. A man who gets land as a gratuity, or the uſufruct of it in name of wages, may reaſonably be confined within the ſtricteſt bounds. But he who purchaſes land, and pays a full price, propoſes to have it under his own management, and at his own diſpoſal. He propoſes, particularly, when he dies, that it ſhall go to his heirs without limitation. And the perſon who aliens, ſuppoſing him to retain the ſuperiority, finds it his intereſt to agree to thoſe conditions, ſince upon that account he gets a greater price for the ſubject. Perhaps this was not provided for in the firſt purchaſes. People who have money to beſtow, will take land upon any terms rather than want. But as the appetite for liberty and independency is active and univerſal, there will always be found purchaſers to pay for theſe conveniencies; and they who ſtand in need of money, will be tempted to diſpoſe of every thing that

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can procure it. And thus, by degrees, the ſucceſſion to heirs of line was introduced into feudal rights: that is, collateral ſucceſſion, properly ſo called, took place, which was not formerly known.

From this deduction it will be obvious, that, for a conſiderable time, collateral heirs were admitted to ſucceed in feus only which were purchaſed with money, or other valuable conſideration. Military feus continued upon their old footing, excluſive of collateral ſucceſſion. And thus the notion of conqueſt came in, as oppoſed to heritage, or what came to the vaſſal from his anceſtors by deſcent. And, during this period, there certainly was no diſtinction betwixt *feuda vetera et nova*; but betwixt feus acquired by purchaſe, which behoved all to be late, and feus granted for military ſervice, which might be either old or new.

When once collateral ſucceſſion came to be known, it grew into repute, and every perſon aimed at it. And as bargains of all ſorts about land came into practice, the

mixed nature of ſuch bargains, partly for a valuable conſideration, partly gratuitous, did quite confound the diſtinction eſtabliſhed betwixt a purchaſe, and a grant for military ſervice; and ſo by degrees it crept into the Feudal law, that new acquiſitions of land, for whatever cauſe, deſcended to heirs of line. And this behoved to introduce a new diſtinction among feus, *viz. feuda vetera et nova.* Under *feuda nova* were comprehended feus *purchaſed*, at whatever time, and late feus *granted*, for whatever cauſe; in all of which collateral ſucceſſion did obtain. Under *feuda vetera* were comprehended all the old feus granted for military ſervice, which deſcended to the male heirs only of the original vaſſal. As theſe old feus are long ago worn out, this diſtinction betwixt *feuda vetera et nova* muſt be at an end. And now, at leaſt in this iſland, every land-right goes to heirs of line, unleſs the contrary be ſpecified.

At what periods theſe ſeveral changes in the feudal ſucceſſion were introduced, is not certainly known. Hiſtory deals not in ſuch

ſuch matters; for lawyers are ſeldom hiſtorians, and hiſtorians as ſeldom lawyers. But as we have traces of theſe diſtinctions in our law-books, though obſcurely handled, the origin of collateral ſucceſſion, and its ſeveral enlargements, follow ſo naturally the increaſe of trade and riches, that there is no reſiſting the conviction which ariſes from the foregoing deduction. Let us but conſider, that once there was no collateral ſucceſſion in the Feudal law, and that now it is univerſal, not by ſtatute, but by cuſtom, and we will find the ſeveral gradations above mentioned natural and eaſy; nay, what muſt neceſſarily have happened by the progreſs of arts and ſciences, which inſpired us not only with a taſte for liberty and independency, but made riches flow in among us, wherewithal to purchaſe theſe bleſſings.

Having opened up the origin of collateral ſucceſſion in the Feudal law, and its progreſs through various changes, with regard to the ſubjects in which it did, and does now obtain; I go on to examine who

theſe collateral heirs are who have a right to ſucceed.

Let us ſuppoſe a ſecond brother makes a purchaſe of land, and dies without heirs of his body, whereby the ſucceſſion opens to his collaterals, the queſtion is, Whether the elder or younger brother ſhould be preferred? The principle above laid down favours the younger, That it is natural for heritage to deſcend, and unnatural that it ſhould aſcend. Further, this was become a ſtandard principle, and conſtantly applied to give preference to the younger brother, in the ſucceſſion of eſtates devolved from a father to a middle brother. And it will be obſerved, that the principle here ought to have the greater effect, as acting without a counterbalance. In the caſe of heritage, where the eſtate deſcends from the common father, we are apt to turn our thoughts upon him, from whence they naturally fall upon his eldeſt ſon. This circumſtance has no force againſt the younger brother, in the caſe of an eſtate acquired by a middle brother; for the eſtate being his own conqueſt,

queſt, we are not prompted to look farther back. In a word, if the younger brother be preferred in heritage, notwithſtanding a propenſity in favour of the eldeſt, much more ought he to be preferred in conqueſt, where there is no ſuch propenſity againſt him. Yet, in fact, the elder brother is preferred by all nations who have embraced the Feudal law. And this will not appear ſtrange, when the circumſtances of time are attended to. We have a propenſity in our nature to act upon general principles, as being eaſy in their application, by avoiding intricacies, which more abſtract reaſoning leads us into. The right of primogeniture was but growing into faſhion when the rules of ſucceſſion in heritage were ſettled, and therefore had not weight enough to counterbalance a natural impulſe. But by the time that land came to be a common ſubject of commerce, the right of primogeniture was eſtabliſhed as a general principle, and as the common law of the land. Inſtances of preferring the younger brother, in the ſucceſſion of the middle brother's eſtate, behoved to be rare, in compariſon of

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preferring the elder brother to the father's eſtate; and ſuch rare inſtances making no figure in oppoſition to the general rule, the right of primogeniture was readily laid hold of to determine this point. And when the error is ſo common of ſubſtituting names for things, it will not ſurpriſe us, that this was made the determining rule, though in ſtrict reaſoning it meets not the caſe. After the hint is given, nothing can be more obvious, than that the cauſe of preferring the eldeſt ſon to the father's ſucceſſion, applies not to the ſucceſſion of a younger brother.

But we are no ſooner extricated out of one labyrinth, than we are involved in a greater. If a third brother dies poſſeſſed of conqueſt, the ſucceſſion, by the law of Scotland, goes to the immediate elder; by the law of England, to the eldeſt. Which of theſe different opinions is beſt founded on principles, may not be an uſeleſs inquiry. The Engliſh, who got the ſtart of us in law, have been guided, in the deciſion, by the principle of primogeniture; and indeed, after conferring the ſecond brother's eſtate upon the

the eldeſt, moved by this principle, it was an eaſy conſequence to confer upon him alſo the third brother's eſtate. Our people, in the infancy of their law, ſwayed more by natural feelings, than by general principles. have judged of this matter differently. Beginning at the third brother, whoſe eſtate was in queſtion, it has been obſerved, that the mind, in its progreſs, paſſes firſt to the ſecond brother, and from him to the eldeſt. In this way the ſecond brother was conſidered as one ſtep nearer to the deceaſed than the eldeſt is, and ſo was preferred to the ſucceſſion.

It is probable the Feudal law was introduced into Scotland, before an opportunity offered of fixing this point among the Engliſh, otherwiſe it would have come along to us, with their other feudal cuſtoms. Thus we were left to our own way of thinking in ſolving the problem. And though we have determined the point, by ſimilitude of diſtance and progreſſive motion, yet it appears, that ſome of our lawyers have not always adhered uniformly to this

this reſemblance. The learned Craig puts a caſe, *lib. 2. dieg. 15. § ult.* It is of four brothers, three of a former marriage, and one of a latter. The youngeſt acquires a land-eſtate, and dies without iſſue. Our author obſerves, that other lawyers declared for the immediate elder brother, though of a different marriage; and ſuch, no doubt, at preſent, is the law of Scotland, whatever difficulty there might be in the queſtion before the rule was eſtabliſhed in practice. But he gives his opinion for the eldeſt brother, "Becauſe (ſays he) in the caſe of "different marriages, the connection or "conjunction begins at the eldeſt, and "paſſes through him to the ſecond and "third." This is obſcurely ſaid; but it is not difficult to gather what our author had in view. The argument, when brought out to light, is ſubtile and ingenious. Where the brothers are all cloſely united by being of the ſame marriage, we feel an intimate connection among them, without thinking of the connecting principle. But amongſt brothers of different marriages, the firſt idea that preſents itſelf, is rather oppoſition than union.

union. This forces us, when we inveſtigate the relation, to begin with the common parent, who is the connecting principle; and as from him the firſt ſtep is to the eldeſt ſon, we conceive this ſon to be one ſtep nearer than the ſecond, and two ſteps nearer than the third.

When the matter of ſucceſſion depends upon ſuch ſlight feelings, it is not wonderful that the cuſtoms of different nations ſhould be ſo different, and that there ſhould not be any uniform or conſiſtent plan of ſucceſſion even in the ſame nation: and indeed our plan, in particular, is far from being uniform. Another miſtake has crept into our law, and into all our law-books, leſs excuſable than any above ſuggeſted. Let us recollect the diſtinction mentioned above, betwixt *feuda vetera et nova*. In the firſt claſs were the old feus, eſtabliſhed upon the footing of military ſervice, where the ſucceſſion was confined to male deſcendents of the original vaſſal, and which conſequently behoved gradually to deſcend, and could never aſcend. The other claſs comprehended

prehended purchaſes, and all late feus, granted for whatever cauſe, which went to heirs of line. In theſe, when the ſucceſſion opened to collaterals of the original vaſſal, the eldeſt brother and his deſcendents were preferred as the heirs of line. It is mighty plain, that theſe *feuda nova* could never become *feuda vetera* in any courſe of time, ſo as to exclude collateral ſucceſſion, or to bar ſucceſſion by aſcent. If conqueſt go to the elder brother, where the purchaſer, a middle brother, dies without iſſue, no imaginable reaſon can be given why it ought not to go in the ſame channel, where the purchaſer leaves a ſon who ſucceeds, and dies without iſſue. In one word, collateral ſucceſſion, and ſucceſſion by aſcent, ought to be convertible terms; if in any one caſe the eldeſt brother is the lineal heir, he ought to be conſidered as ſuch in every caſe of collateral ſucceſſion. But theſe matters firſt took footing in the days of ignorance, when the conceptions of mankind were groſs and inaccurate. What it may be in other countries, I know not, but in the practice of Scotland

Scotland a very motely ſyſtem is eſtabliſhed. We conceive nothing to be a *feudum novum*, but an immediate purchaſe. If it have once paſſed by ſucceſſion, we underſtand it to be a *feudum antiquum*, or heritage; not ſo indeed as to exclude collateral ſucceſſion, but ſo as to make the ſucceſſion for ever after to deſcend, and never to aſcend. And we have been led into this practice by an error, apt, as above obſerved, to ſlip into all ſorts of reaſoning; which is that of miſtaking words for things. Not attending to the import of the diſtinction betwixt *feudum antiquum et novum*, we took up with the word, and deſerted the meaning; and ſo by degrees came to conceive every old feu to be *feudum antiquum*. And as there are no preciſe boundaries betwixt what is old and what is new, we were forced, at laſt, to fix upon the following rule, That whatever has paſſed by ſucceſſion, is to be underſtood a *feudum antiquum*. Having once introduced this arbitrary diſtinction, in place of the former, we unwarily applied to it thoſe general rules which apply only to the original diſtinction betwixt *feudum an-*

tiquum et novum. Nothing can be more groſs: in place of the proper diſtinction betwixt *feudum antiquum et novum,* to ſubſtitute another of a quite different nature, that has no relation to it but the name; and yet to miſtake this new-invented diſtinction for the old, ſo as to give it the ſame effect in law, was certainly confounding things in a ſtrange manner, and what could only happen in the days of ignorance. It is very true, that we proceeded no farther than to exclude the privilege of primogeniture, where a feu had once been taken up by ſucceſſion. We never conſidered it to be a *feudum antiquum* in any ſuch proper ſenſe, as to exclude collateral ſucceſſion. Falſe reaſoning could ſcarce lead us ſo far. In judging of a nice caſe, ſuch as the competition betwixt two brothers, we might be led to ſubſtitute one idea for another, the *feudum antiquum* for the *feudum novum*; eſpecially if the diſpute happened about a feu that was really old, or of a long ſtanding. But, in a diſpute betwixt the heir of the vaſſal and the ſuperior, where the queſtion behoved to turn upon a point of fact, Whether the

the feu was granted after the period that all grants of this kind were underſtood to go to heirs of line? it was ſcarce poſſible that any miſtake ſhould happen.

And now, to explain the terms of *heir of conqueſt* and *heir of line*, let us ſuppoſe a *feudum novum* and a *feudum antiquum*, properly ſo called, centered both in a middle brother: the laſt, it is plain, cannot be, but by a deſtination excluding the eldeſt brother. Or let us ſuppoſe them both to be *feuda nova*, the one purchaſed by the ſecond brother himſelf, the other eſtabliſhed in his perſon by virtue of a deſtination. Or, conformable to our preſent practice, let the one be a purchaſe, the other a ſubject to which he derives right, as repreſenting a younger brother. The eldeſt brother will ſucceed in the land purchaſed by the middle brother, the younger will ſucceed in the land that came to the middle brother by ſucceſſion. And in this manner it may often happen, that the ſame perſon's ſucceſſion is ſplit and divided betwixt two male repreſentatives, the one named *the heir of line*, the other

the heir of conqueſt. Theſe names are uſed in the particular caſe only, where both repreſent the ſame perſon. In other caſes, where there is no occaſion to make the diſtinction, they paſs under the common appellation of *heirs at law.* For example, an eldeſt ſon ſucceeding to land purchaſed by his father, is not ſtyled *heir of conqueſt*, but *heir at law*, or *of line*. But with regard to this, though the elder brother is named *heir of conqueſt*, in oppoſition to the younger, who has the name of *heir of line*, we muſt beware not to conſider the heir of conqueſt as a limited heir. It is certain he is *eadem perſona cum defuncto*, and an univerſal repreſentative, equally with the heir of line properly ſo called. So ſays the Lord Stair, *tit. Heirs*, § 10. And he aſſigns a very ingenious reaſon for giving to the younger brother the title of *heir of line*. "The elder brother (ſays he) is "called *the heir of conqueſt*, and the other "retaineth the common name of *the heir* "*of line*;" which is ſaying, that the younger brother is allowed to retain a name com-

mon

mon to both, for want of another term to diſtinguiſh him by.

Touching heirſhip-moveables, tacks, penſions, or other ſuch rights from which the executor is excluded, and which, properly ſpeaking, are not land-rights; it is ſettled in practice, that theſe go all to the heir of line, and not to the heir of conqueſt. The foundation of this practice may be readily gueſſed. Let us recall what is obſerved above, that the right of primogeniture, confined at firſt to military feus, was gradually extended to take place in the ſucceſſion of males, whatever was the nature of the feu. But as there had been no example of the right of primogeniture in the ſucceſſion of females, our forefathers did not think of carrying this right beyond the practice, and ſo confined it to the male ſucceſſion. The ſame has happened here. The privilege of primogeniture had taken place in ſucceſſion to land only; and as there was no example or authority to determine the point touching the ſubjects now in queſtion, natural

feelings prevailed, and the propenſity to paſs downwards, or according to the ſucceſſion of time.

PART II.

IN order to accompliſh the taſk we have undertaken, it will be neceſſary to take a view of the tranſmiſſion of moveables from the dead to the living, and of the different changes this ſpecies of ſucceſſion has undergone in Britain.

Hiſtories of all the later ages are filled with the incroachments of the Roman clergy. There is no end of the artifices uſed by them to uſurp power and riches. It appears ſtrange, that by all the hiſtorians who write with great ſpirit againſt them, one of their moſt ſucceſsful ſtratagems to ingroſs money ſhould be overlooked And yet this is ſo true, that we are entirely indebted to our ſtatute-book, for keeping in memory one of the moſt notorious inſtances of

of prieſtcraft ever was practiſed. Would any one believe, that there is a country, and in Europe too, where the clergy once gained ſuch an aſcendant over the minds of the people, as that the moveable eſtate of every man who died inteſtate was tamely ſuffered to be ſwallowed up by that rapacious body? Thoſe who draw their notions from the preſent age, will ſcarce believe, that ſuperſtition could ever be ſo prevalent, as to produce a law preferring the biſhop to the next of kin. But let them ſuſpend their wonder for a moment, till they learn the whole extent of this law. It did not ſtop at excluding the relations of the deceaſed, even ſuppoſing them to be his children. The wife was excluded. Nay the creditors were excluded. All was given to the biſhop *per averſionem*. Of Britain we are talking, and yet the ſhameleſs rapacity was ſuffered here for ages. We may believe ſuch a monſtrous practice could not be eſtabliſhed at once. It crept in by degrees. The foundation was laid in a doctrine ſedulouſly inculcated, That the moveable effects of every man deceaſed, failing his own appointment,

pointment, ought to be laid out for promoting the good of his ſoul. This brought the clergy into play. The Ordinary at firſt pretended to give advice only; but this advice, in proceſs of time, gained authority, and became a command. At laſt the maſk was thrown off, and the Ordinary, without ceremony, took poſſeſſion, not deigning to account to any mortal. Let us hear a grave author* upon this ſubject: "Originally the goods of the inteſtate paſſ-
"ed by a kind of deſcent to the children;
"afterwards, by a Saxon law, the wife had
"her part. In Henry I.'s time, the clergy
"had gotten a taſte: for although the
"wife and children, or next of kin, had
"then the poſſeſſion; yet it was for the
"good of the ſoul of the deceaſed; and
"the Ordinary had a directing power there-
"in, and was in the nature of an overſeer,
"and ſomewhat more. Afterwards, in the
"time of King John, the clergy had drawn
"blood; for though the poſſeſſion was as

* Bacon's Diſcourſe of the laws and government of England, *part* 1. *cap.* 66.

"formerly,

" formerly, yet the dividend muſt be
" made in the view of the church; and by
" this means the dividers were but mere
" inſtruments, and the right was vaniſhed
" into the clouds. But in Henry III.'s
" time, the clergy had not only gotten the
" game, but gorged it: both right and poſ-
" ſeſſion was now become theirs, and
" wrong done to none but the clouds."

And ſo it came to be ſettled *, That if a man died inteſtate, neither his wife, children, nor next of kin, had right to any ſhare of his eſtate; but the Ordinary was to diſtribute it, according to his conſcience, to pious uſes: and ſometimes the wife and children might be amongſt the number of thoſe whom he appointed to receive it; but he was, however, under no reſtraint; the law truſted him with the whole diſpoſition.

The firſt ſtatute that limited the power of the Ordinary was 13th Edward I. *c.* 19.

* New Abridgement of the law, tit. *Executors and adminiſtrators, p.* 398.

by

by which it is enacted, " That where a " man dies inteſtate, and in debt, and the " goods come to the Ordinary to be diſpo- " ſed, he ſhall ſatisfy the debts ſo far as " the goods extend, in ſuch ſort as the ex- " ecutors of ſuch perſon ſhould have done, " in caſe he had made a will." Afterwards the poſſeſſion was taken from the Ordinary, by obliging him to give a deputation *to the next and moſt lawful friends of the inteſtate, for adminiſtrating his goods*; 31ſt Edward III. *cap.* 11. But this ſtatute was not a ſufficient bar to the avarice of the clergy. Means were contrived to evade it, by preferring ſuch of the inteſtate's relations who were willing to offer the beſt terms. This corrupt practice was ſuffered to the days of Henry VIII. when the clergy loſing ground, the ſtatute 21ſt Henry VIII. *cap.* 5. was enacted, bearing, " That in caſe any perſon die inteſtate, or " the executors refuſe to prove the teſta- " ment, the Ordinary ſhall grant admini- " ſtration to the widow, or to the next of " kin, or to both, taking ſurety for true " adminiſtration."

This

This ſtatute, as it aſcertains the perſons who are intitled to have letters of adminiſtration, without leaving any choice to the Ordinary, was certainly intended to prevent his making gain of the effects of perſons dying inteſtate. But the church doth not eaſily quit its hold: Means were contrived to evade this law alſo. Though by theſe ſtatutes the poſſeſſion was wreſted out of the hands of the Ordinary, yet his pretenſions ſubſiſted entire, of calling the adminiſtrator to account, and obliging him or her to diſtribute the effects to pious uſes. This was an admirable engine in the hands of a churchman for ſqueezing money. We may readily believe, that the adminiſtrator who gave any conſiderable ſhare to the biſhop, to be laid out by him, without doubt, upon pious uſes, would not find much difficulty in making his account. It was probably this rank abuſe, which moved the judges of England ſolemnly to reſolve, That the Ordinary, after adminiſtration granted by him, cannot compel the adminiſtrator to make diſtribution *. But at laſt the right of

* Laſt mentioned author, *p.* 414.

the

the next of kin was fully eſtabliſhed, by ſtatute 22d and 23d *Car.* II. *cap.* 10. which enacts, That after payment of debts, funerals, and juſt expences of all ſorts, the ſurpluſage ſhall be diſtributed as follows: "One third to the wife of the inteſtate; the "reſidue amongſt the children, and ſuch as "legally repreſent them, if any of them "be dead. If there be no children, nor "legal repreſentatives of them, one moiety "ſhall be allotted to the wife, the reſidue "equally to the next of kin to the inteſtate "in equal degree, and thoſe who repre-"ſent them. But no repreſentation ſhall "be admitted amongſt collaterals, after "brothers and ſiſters children. And if "there be no wife, all ſhall be diſtribute "amongſt the children; and if no child, "to the next of kin to the inteſtate in "equal degree, and their repreſentatives."

We may reaſonably conjecture, that the church was equally ſucceſsful in both parts of the iſland. It is indeed laid down in the *Regiam Majeſtatem*, *l.* 2. *cap.* 37 That the wife and children are each of them in-

titled

titled to a third ſhare of the moveables, and that when a man makes his teſtament, he has no power of diſpoſal but of the remaining third part; which therefore is called the dead's part. And this alſo appears to have been the law of England, *Fleta, l.* 2. *cap.* 57. § 10. But however plauſible the inference may appear, it does not in fact hold, that the Ordinary, in diſtributing the goods of one who died inteſtate, was limited, in the ſame manner as the proprietor himſelf was, in making his teſtament. In England, as above obſerved, though the wife and children had a legal claim, which could not be diſappointed by teſtament; yet ſuch was the authority and influence of the church, that the Ordinary was laid under no ſuch reſtraint. In diſtributing the effects of an inteſtate, he was ſubjected to no law, but that of his own conſcience. Even creditors had no legal claim till it was given them by ſtatute. The caſe was the ſame in Scotland; for which we need no other authority than the ſtatutes of King William, *cap.* 22. ſubjecting the Ordinary to pay the debts of the deceaſed, to the extent of

his moveables. If before that time the creditors had not a legal claim, the wife, children, and next of kin, could have none. This defect, however, was not by the wife and children ſeverely felt; as the Ordinary ſeldom ventured to defraud them of their legal ſhare. In a provincial council of the Scotch clergy, held *anno* 1420, recorded in Wilkin's *Concilia Mag. Brit. vol. 3. p.* 397. it is laid down as the eſtabliſhed practice, That the goods of thoſe who die inteſtate, are divided into three ſhares; one to the wife, another to the children, and a third, called *the dead's part*, which laſt paid to the biſhop a ſhilling of the pound, in name of *quot*.

But with regard to the dead's part, the Ordinary took more liberty. It was thought ſufficient, that a man had it in his power, to ſettle by will this portion of his effects. If he made no will, it was underſtood to be his intention, that the Ordinary ſhould have the ſole management and diſtribution; and it was thought no intolerable hardſhip, that the church ſhould have this power, when it

it appeared to proceed from the preſumed will of the deceaſed. But caſes occurring, of perſons under age dying before they were capable to make a teſtament; which left their next of kin without remedy, as they had not an action at common law againſt the executors-dative, to oblige them to account; this was thought a grievance; to remedy which, the act 20. parl. 1540, was made. The preamble is, That "where- "as perſons often dying young, who can- "not make a teſtament, the executor "named by the Ordinary, does notwith- "ſtanding intromit with the whole goods, "and withdraws the ſame from the neareſt "of kin, who ſhould have the ſame by "law;" therefore enacted, "That where "any perſon dies within age, who cannot "make a teſtament, their next of kin ſhall "have their goods; without prejudice to "the Ordinary's claim of a *quot*." But it is to be obſerved, that the remedy here given to the next of kin, is far from being general, to afford them a claim againſt the executor in all caſes. The ſtatute takes

place only where a perſon dies ſo young as not to be *teſtamenti capax*.

This was a happy commencement, however, and was productive of other improvements. One article of the inſtructions given to the commiſſaries *anno* 1563, is, "That if one die inteſtate, or his executor "nominate refuſe to accept of the office, "the commiſſaries muſt give the office to "the neareſt of kin, being willing to find "caution." This is copied from the above-mentioned ſtatute of Henry VIII. enacted a few years before. But the regulation had ſtill a better effect in Scotland than in England. It required a ſtatute there to complete the right of the next of kin, and to give them a legal footing to ſupport their natural claim againſt the incroachments of the church: but in Scotland, Epiſcopacy being aboliſhed ſoon after the reformation, and the biſhops, immediately upon the reformation, having loſt all civil juriſdiction, the next of kin confirmed executors, were intitled of courſe to retain the free effects.

The

The biſhop had loſt his claim, and the commiſſaries never had any.

It is obſervable, that in the foregoing articles of the inſtructions 1563, no mention is made of the widow, though her intereſt is expreſsly taken care of in the Engliſh ſtatute, whence the article is copied. This could not have happened by inadvertency. My conjecture is, That our judges have taken the honeſt liberty to ſuſtain action againſt the Ordinaries, to the widow for her third, and to the children for their legitim, in imitation of King William's ſtatute, affording action to creditors. Nor was this a great ſtretch; for if by eſtabliſhed practice it was underſtood to be the duty of the Ordinary, in diſtributing the goods of an inteſtate, to give a proportion to the wife and children, as mentioned above; it was natural for the civil court to interpoſe by an action, if the Ordinary tranſgreſſed his duty: and if a legal claim was afforded to the wife and children, by the courts of law, it was unneceſſary to take any notice of them in the inſtructions 1563. Our judges indeed

muſt have been extremely ſcrupulous, had they denied this remedy to the wife and children, conſidering, that by the common law of the land, the wife and children had an unexceptionable claim againſt the executor nominate. And it might well be thought ſtrange, and unaccountable, that a man ſhould have it in his power to defraud his wife and children of their juſt claim, by forbearing to make a will, or that the Ordinary ſhould not be liable as well as the executor nominate.

But to return to the next of kin, who were now advanced one ſtep by the foreſaid inſtructions, which provides for them where there is no teſtament: it will be obſerved, that they were ſtill left without remedy, where a teſtament was made, unleſs it was made in their favour. They had no privilege hitherto, ſave that of being preferred to the office of executry. But this privilege could not take place againſt an executor named by the teſtator; nor had they any action at common law to oblige the executor nominate to account. It was underſtood

underſtood the teſtator's will, that the diſtribution ſhould be left to the diſcretion of the executor, where the contrary was not expreſſed; juſt as formerly it was underſtood to be his will, to leave all to the diſcretion of the Ordinary, where he died inteſtate. And thus it happened, that the very nomination intitled the executor to retain to himſelf the free moveables, even where he was not named univerſal legatar. This was remedied by the act 14. parl. 1617, which gives to the next of kin the like action againſt the executor nominate, to account for the defunct's effects, that formerly lay againſt him at the inſtance of the wife and children.

There is, perhaps, not upon record a ſtronger inſtance of the power, as well as rapacity of the Romiſh clergy, than what we have now under conſideration. Such were the ſteps taken by our forefathers, to rectify this abuſe, and to reſtore the law of nature. But no total remedy was hitherto provided: there ſtill remained caſes in which the next of kin had no claim. If, for

example,

example, the next of kin were infants, or perhaps abroad, ſo as to have no opportunity to apply for confirmation, no action lay at their inſtance againſt the procurator-fiſcal, nor againſt any other, upon whom the office of executor was beſtowed by the commiſſaries. It is true, that upon the foundation of the above-mentioned inſtructions 1563, the next of kin might have acceſs to annul ſuch nomination by the commiſſaries, if they could excuſe their abſence, and ſhow, that they were prevented from applying for the office. But, at any rate, this remedy would come too late, after the goods were diſtributed. This defect was ſupplied by the authority of Oliver Cromwel. For, in the *orders for regulating the prices and proceedings in the ſheriff and commiſſary courts, by the commiſſioners for adminiſtration of juſtice to the people in Scotland, dated the 14th January* 1654, it is enacted, article 15. " That " whoever ſhall obtain themſelves execu- " tors-dative, confirmed to any defunct, " ſhall be liable to the wife and neareſt of " kin for their reſpective portions of the

" free

" free goods in teſtament, by an immedi-
" ate ordinary action; without neceſſity to
" reduce the former teſtament, or to ob-
" tain themſelves executors to the defunct."
And that this regulation ſupported itſelf by its intrinſic equity, notwithſtanding the defect of lawful authority, is vouched by the preamble of the act of ſederunt, 14th November 1679, premiſing, as a thing incumbent upon all executors, by virtue of their office, " That they ſhould execute
" the teſtament of the defunct, by recover-
" ing his goods, and obtaining payment
" of the debts owing to him, for behoof
" and intereſt of the relict, children, or
" *neareſt of kin*, creditors, and legatars of
" the defunct."

From this ſhort hiſtory of the tranſmiſſion of moveables from the dead to the living, it will be evident, that there is no ſuch thing, properly ſpeaking, in the common law of this iſland, as an heir *in mobilibus*. If a will be made, the form of it is, to name an executor or truſtee to diſtribute the effects, according to the will of the teſtator,

teſtator, if expreſſed; and if not expreſſed, according to eſtabliſhed rules. According to this form, there is no place for the ſucceſſion of an heir; and until a late regulation, by and by to be mentioned, as little was there place for this ſucceſſion, where no will was made. If a perſon died inteſtate, the whole moveable effects were *eo ipſo* veſted in the Ordinary, or, in place of him, the commiſſaries, in Scotland; not in the quality of heirs, but as truſtees to diſtribute the effects to pious uſes. Accordingly no perſon was legally intitled to take poſſeſſion of an inteſtate's effects, otherwiſe than by an expreſs warrant from the Ordinary or commiſſaries. And after the reſtoration, the biſhops in Scotland took great care to preſerve their right. They had ſpies in all corners; and no ſooner was a man laid in his grave, than they thundered out all the artillery of law, to force his relations to apply for letters of adminiſtration. This grievance, among others, was redreſſed after the revolution. What was ſuffered with impatience under the juriſdiction of biſhops, was not at all to be endured

endured under the juriſdiction of their ſhadow, the commiſſaries. Accordingly a ſtatute was made, act 26. parl. 1690, diſcharging ſuch proſecutions in time coming: "That no perſon ſhall be bound to give "up inventory of a defunct's goods; and "that there ſhall be no confirmation, un-"leſs at the inſtance of the relict, chil-"dren, neareſt of kin, or creditors." It was the intention of our legiſlature, by this ſtatute, though not ſaid expreſsly, to tranſfer to the children or next of kin, the property of the moveables which belonged to the deceaſed, without requiring any other act or ſolemnity, but barely apprehending the poſſeſſion. This will be obvious, from conſidering, that, by the common law, there is no other form known, of acquiring the property of moveables which belonged to a deceaſed perſon, but by warrant of the Ordinary or commiſſaries. And when this form is diſpenſed with, without ſubſtituting any other, poſſeſſion alone muſt have the effect. It is true, confirmation is not altogether laid aſide; it is ſtill of uſe to preſerve the poſſeſſor from being

being liable to creditors beyond the value of the ſubject. But if the children or next of kin are willing to ſubject themſelves to this riſk, they may take poſſeſſion, without confirming. And thus, after much wandering, the tranſmiſſion of moveables from the dead to the living is reſtored to its natural channel: for with reſpect to thoſe, at leaſt, who die inteſtate, their moveables are now tranſmitted by ſucceſſion; and ſo far it may be ſaid properly, that we have an heir to the perſonal eſtate, as well as to that which is real.

It remains only to be obſerved, that though in England the *jus repræſentationis* is introduced to a certain extent, in the ſucceſſion of moveables *ab inteſtato*, we have not thought proper to follow this practice. We adhere ſtrictly to the law of nature in moveable ſucceſſion, by preferring the next of blood, without diſtinction betwixt male and female, and without regard to the privilege of primogeniture.

APPEN-

APPENDIX.

UPON

THE HEREDITARY AND INDEFEASIBLE RIGHT OF KINGS.

THE hereditary indefeaſible right of kings, and paſſive-obedience and non-reſiſtence its genuine offspring, are doctrines which of late have made a great noiſe in Europe, and particularly in this iſland. Some reflections upon this ſubject, ſuggeſted by the preſent unhappy times, will make a proper appendix to the eſſay immediately foregoing.

When we conſider man abſtracted from all poſitive engagements, we find nothing in his nature, or in his ſituation, that ſubjects him to the power of any, his creator, and his parents, excepted. The parental power is at an end, when children, grown up, can provide for themſelves. At any rate, the parental power cannot ſubſiſt longer than the life of the parents; for it depends on

perſonal circumſtances, and is not a matter of property to be tranſmitted by ſucceſſion. And ſuppoſing it a ſubject to be taken by ſucceſſion, it muſt deſcend to all the children equally, at leaſt to all the ſons equally; for primogeniture, it is certain, is not a privilege of the law of nature, but only of the Feudal law. Hence it is a principle embraced by the moſt ſolid writers, That all men are born free, and independent one of another.

Man indeed is fitted for ſociety. His wants prompt him to it, and his inclinations render it agreeable. Accordingly we find mankind almoſt every where parceled out into ſocieties, which, by accidental circumſtances, have been originally formed, more or leſs extenſive. A ſociety of any extent cannot be without government. The members muſt have laws to determine their differences, and they muſt have rulers to put theſe laws in execution. At the ſame time, we find the conſtitutions of different ſtates, with regard to government, almoſt as various, as are the ſentiments of men concerning

concerning it: And though government be neceſſary to the well-being of ſociety, yet, from the foregoing conſideration alone, were we to look no farther back, we may conclude, that no particular form is neceſſary, but that all are the effects of choice, or perhaps in ſome meaſure of natural cauſes.

Let us trace this matter farther, becauſe it is of importance. Man is a ſhy animal, and in his original ſtate, rather averſe to ſociety. In this ſtate his wants are few, and eaſily ſupplied; and we may readily conclude, that while acorns were the food of man, and water his drink, there was neither uſe nor appetite for ſociety. Accordingly, we find men originally in every corner of the earth, living in ſcattered habitations, with little intercourſe, except among the members of the ſame family. The culture of corn laid the foundation of a more extenſive intercourſe, becauſe thereby mutual aſſiſtance became neceſſary. When arts were invented, and induſtry increaſed, it was found convenient to herd

together in towns and villages. From this near connection one evil ſprung, oppoſition of intereſts, formerly rare; which at firſt was the occaſion of quarrels and bloodſhed, and afterwards of frequent appeals to men of weight and probity. The neceſſity of fixed judges to determine differences being diſcovered, the election of theſe judges, which could not otherwiſe be than popular, was the firſt ſtep to government. The chief magiſtrate therefore was originally no more but the chief judge, whoſe powers were gradually unfolded, as caſes occurred which required the interpoſition of a ſuperior or governor. War introduced ſlavery, as it ſubjected thoſe taken in battle, to the arbitrary will of their conquerors; and abſolute power was too deſireable an acquiſition, to be confined to private perſons. The chief magiſtrate, however repugnant it be to the nature of his office, did often graſp at it: And hiſtory informs us, that the chief magiſtrate, in different ſocieties, was often too ſucceſsful. In a word, abſolute independence and abſolute power are the two extremes; and the

the latter, at leaſt ſo far as concerns ſovereignty, could never have been introduced, but by paſſing through all the intermediate degrees.

Government is one of the arts which neceſſity hath ſuggeſted, which time and experience have ripened, and which is ſuſceptible of improvements without end. It muſt alſo be the privilege of every ſociety to improve upon its government, as well as upon manufactures, huſbandry, or other art invented for their good. No particular form therefore can be eſſential, as no particular form is preferable to another, unleſs by having a greater tendency to promote its end, the good of the ſociety. Comparing democracy, ariſtocracy, and monarchy together, this is their common ſtandard.

There is a people inhabiting the earth, who are not left to the choice of their governors, but are by nature ſubjected to monarchy. This people is diſtributed into different ſocieties, and in each there is a

royal family, of a diſtinct ſpecies from the other members. Every monarch is born with marks of royalty, of a peculiar ſhape, and with ſuperior beauty. We may infer, that the excellencies of the mind are not inferior to thoſe of the body; and it is not wonderful, in ſuch a caſe, that perfect obedience ſhould be univerſal in that ſtate, and that the monarch's will ſhould be the only law. Here the parts are finely adjuſted to each other, the ſovereign framed for command, as the ſubjects for obedience; each in their ſeveral capacities equally contributing to the ſole end of government, the well-being of the ſociety. The monarch, taught by nature, that the ſovereign power is a truſt which ought not to be abuſed, has no deſire other than to promote the public welfare. The people, taught by nature, that paſſive obedience and non-reſiſtance are the means to promote their happineſs, implicitly ſubmit themſelves to their monarch's will.

Were mankind ſo framed, for of a ſpecies of inſects we have been ſpeaking, thoſe gentlemen

gentlemen would have reaſon on their ſide, who declare ſo ſtrongly for indefeaſible hereditary right, and the reciprocal duty of paſſive obedience and non-reſiſtance. Were the royal family in every ſociety, like that of the bees, diſtinguiſhed from the maſs of the people, by ſuperior excellencies, whether of mind or body; were they unerringly prompted by nature to exerciſe their power for the welfare of the ſociety; blind obedience to their will would be a virtue. But when we truſt with ſovereign power, one of the common ſtamp of mankind, who has by nature no marks of royalty, and who, perhaps, by nature has not talents for government, the abſurdity is great, to maintain, that this perſon ought to be under no control; and that we ought to continue to truſt him, after repeated inſtances of betraying his truſt.

I have no occaſion to conſider, whether, by the law of nature, conqueſt be a good title to acquire the abſolute dominion of a ſtate, as in Turky, where the Grand Signior is ſuppoſed to be lord of the manor, and

and all the people his ſlaves. This is not government, the characteriſtic of which is, truſt repoſed in one for the good of the whole. It is like a private eſtate, which may be diſpoſed of by the proprietor without control, and applied for his own purpoſes. It cannot be pretended that the King of Britain has his right by conqueſt; and therefore no ſupport can be brought to the argument from that quarter.

The ſyſtem, I yield, is ſo far conſiſtent, that if we ſuppoſe the king's right indefeaſible, and that he cannot be deprived of his authority, however much his meaſures ſwerve from the rules of good government, it muſt follow, that the people are tied to paſſive obedience and non-reſiſtance, as there is no *medium* betwixt reſiſtance and obedience. But where is the foundation of the indefeaſible right of the king, more than of any other officer of the ſtate? Doth it lie in the name? One ſhould ſcarce think ſo, when the name is applied indifferently to governors of great and of little power. It cannot lie in the nature of

of the office, which being a truſt, is undoubtedly forfeitable upon maleadminiſtration. It will perhaps be ſaid to lie in the conſtitution of our government. So far from it, that no man is bound to obey the king's commands, unleſs delivered in a certain form preſcribed by law. And even in France, ſuppoſing it an abſolute monarchy without any conſtitutional check upon the king's actions, the king's power is notwithſtanding limited. There cannot be ſuch a thing in law, as a voluntary ſurrender of the liberties of a people to the arbitrary will of any man. The act would be void, as inconſiſtent with the great law of nature, *Salus populi ſuprema lex.*

But the favourers of this doctrine, when beat out of theſe intrenchments, have a retreat, which they ſuppoſe impregnable. They are forced to admit that the king may do wrong, by betraying the truſt repoſed in him: But then they maintain, that a king having no ſuperior on earth, can have no proper judge of his actions but God alone, from whom his power flows; and therefore

fore is accountable to none but the Almighty. This is a fortreſs built upon ſand. All power, no doubt, is from God, natural and legal; for he is the creator and upholder of all things. But it follows from this, inſtead of being contradictory to it, that every ſort of power is limited by the oppoſition of other powers, natural or legal, which are equally from God with the power reſiſted. Perhaps they mean, that every king has his commiſſion from the Almighty, and not from the people. Hiſtory alone may ſuffice to inform us, that this cannot be, when there have exiſted ſo many kings unworthy of command. But ſuppoſing the fact, it follows not, that this commiſſion is unlimited. On the contrary, it muſt be limited; for who can patronize ſo impious a doctrine, as that God will give a commiſſion to any being, to plague and perſecute mankind, unleſs for their ſins? The voice of nature is the voice of God; and it is a fixed principle in the law of nature, That where there is no common judge to appeal to, the party injured may do himſelf juſtice. The laws are ſuperior

perior to the king, and theſe he muſt be judged by. And ſuppoſing an abſolute government in the ſtricteſt ſenſe, where the kng's will is law; yet there is always one law above him, which is that of ſelf-preſervation. If his actions generally tend to deſtruction, inſtead of government, the people, who have no judge to appeal to, may lawfully do themſelves right: *Salus populi eſt ſuprema lex.*

But after all, where is the neceſſity of God's extraordinary interpoſition, by granting his immediate commiſſion to kings, when in other matters he chuſes to govern the world by ſecond cauſes and ordinary means? Why ſhould we ſuppoſe, that mankind are deprived of their natural privilege of chuſing their firſt magiſtrate, more than of chuſing thoſe that are ſubordinate? Where is this commiſſion recorded? Is it given to all rulers who have the name of *King*, or are ſome nations peculiarly honoured? Is it given to all ſovereigns in general, whether honoured with the name of *King* or not? Was this commiſſion given to all the crown-

crown-vaſſals in France, dukes, earls, Barons, who uſurped, and for many ages, poſſeſſed a ſort of ſovereignty within their own territories? Theſe are puzzling queſtions, and it would require an expreſs revelation to put an end to them. In behalf of the legiſlative power, though ſuperior to that of the king, no peculiar interpoſition of Providence is pretended. This body is left to be modelled by choice or by accident. The government of the world is after this manner carried on; and yet nothing happens, we may preſume, contradictory to the original plan of Providence. Why then a peculiar Providence in behalf of kings, or an immediate revelation, when there appears to be no neceſſity? We cannot, without impiety, admit of the ſuppoſition, when, ſo far as weak man can conjecture about the operations of the Almighty, he never interpoſes by extraordinary means, unleſs where the ordinary diſpenſations of Providence prove inſufficient to anſwer his purpoſes. We may therefore conclude, with the higheſt degree of aſſurance, that kings have no other commiſ-

ſion

ſion from God, but what is enjoyed by every magiſtrate, ſupreme and ſubordinate, who is legally elected according to the ſtanding rules of the ſociety to which he belongs.

But doubts and difficulties multiply upon us. Were we, by a revelation from heaven, made acquainted with the names of all thoſe nations, which, like the Jews of old, are to be governed by magiſtrates of God's expreſs appointment; and were we, by the ſame means, made acquainted with the families who are to bear his commiſſion; the revelation would ſtill be imperfect. It is not enough to aſcertain the family; the rules of ſucceſſion muſt alſo be aſcertained, that there be no diſpute about the individuals who are to enjoy this heaven-deſcended privilege. Here, without a new revelation, we are left in a great meaſure at an uncertainty: For are we to follow the rules of England or of France? Are we to be guided by the law as at preſent eſtabliſhed, or as it was three centuries ago? Whatever rules be followed, we muſt

be ſenſible they are in a great meaſure arbitrary, the offspring of accident, or of the ſlendereſt feelings of the imagination, and eſtabliſhed by cuſtom only. Has not this a ſtrong appearance of leaving to every nation the choice of their own magiſtrates? Kings were at firſt choſen for life. It crept into practice to make all public offices hereditary; and the ſovereign power has generally come to be hereditary, partly from inclination, and partly to avoid the inconveniencies of an elective monarchy. But after what manner is this hereditary right of kings carried on? Not by any univerſal law, expreſsly revealed, or ſtamped on the nature of man; ſo far from it, that the rules of ſucceſſion differ in every country, being eſtabliſhed by cuſtom alone, or, in other words, by the conſent of the people. In France, for example, the females are totally excluded. Have females by the appointment of the Almighty this indefeaſible right of ſucceſſion? If they have, France for many ages has been in a damnable error. If not, the load of the guilt muſt lie upon England, and upon many other countries

countries who admit of female ſucceſſion. This dilemma cannot, I think, be evaded, otherwiſe than by fairly acknowledging, that God, in this matter, as well as in others, works by ſecond cauſes without any direct interpoſition; leaving every nation to be governed by laws of their own appointment. And indeed nothing is more abſurd, than to ſuppoſe, that hereditary monarchy is the indiſpenſable appointment of the Almighty, unleſs, by infallible marks, the perſons could be aſcertained who are to enjoy this extraordinary privilege; for this would be to command us, under pain of damnation, to give entire ſubmiſſion to perſons, as rulers appointed by the Almighty, without revealing who theſe perſons are.

Another inference may be drawn from the doubtfulneſs of the law of ſucceſſion. It is a ſelf-evident propoſition, That no right can be ſtronger than the title upon which it is founded. No title is more ſlender, in moſt inſtances, than that of ſucceſſion. How then can it be maintained, that the hereditary right of kings is indefeaſible, when the

title upon which the right is founded, is so weak and so arbitrary. I think we may with certainty conclude, that such a right must, upon every occasion, give place to the primary rights of nature, such as tend to our preservation and well being: and therefore that any particular heir may be safely set aside, when he becomes dangerous to the society. For it is assuredly the voice of God, That in every conflict the weaker right must yield to the stronger. Nay, we may go one step farther, that if the good of the society can be more promoted by a different form of government, hereditary right may be laid aside altogether, without any crime; since the good of the society is an object of much greater importance than the right of any individual can be.

Touching the family of Stuart, no right has less the air of divine authority than what they had to the crown of Britain. To look no farther back than to the competition betwixt Bruce and Baliol, which, in those days, appeared, and truly was an intricate affair: Was Baliol a king by divine appointment, when

when his only title was an award given by Edward of England, who is ſhrewdly ſuſpected to have been ſwayed more by political conſiderations, than by juſtice and equity? Unhappy is the condition of that people, who are bound to make a right choice of God's vicegerent, under the pain of damnation, and yet have no better authority to direct their choice, than ſuch an award. It will be ſaid, that the right was with Baliol. But how the patrons of the divine right of kings ſhould come to a certainty in this matter, I am at a loſs to underſtand. For, not to mention the pretenſions of his competitor Bruce, it is perhaps not extremely clear, that a female has any divine right to a crown; at leaſt there is no inſtance of this among the Jews. And if females be admitted, I cannot ſee why the kingdom ought not to be ſplit among female heirs, as well as a private eſtate. If right to a crown be conſidered as a matter of property, there certainly ought to be no difference. But rejecting by the lump all difficulties, and ſuppoſing Baliol's right of primogeniture to be the divine law, it is plain, Robert Bruce could have

no divine right, nor can the Stuarts have a divine right, who derive their right from him. It is but a mean ſubterfuge, That none of Baliol's race appear to claim the crown. Will it be ſaid, that this nation continued in an obſtinate courſe of rebellion againſt the King of heaven, ſo long as any of Baliol's race exiſted? How do we know they do not at preſent exiſt? It is our indiſpenſable duty to ſearch for the king whom God has given us, through every corner of the earth. It is equally our duty to refuſe our obedience to an uſurper; and he muſt be ſo, who has not a hereditary right, and conſequently is not of God's appointment. Let us keep in view, that preſcription, poſitive or negative, can avail nothing, which has no other foundation but univerſal conſent, implied from a long acquieſcence.

The aſſerters of this divine right dare not yield, that Baliol forfeited the crown of Scotland, by acknowledging himſelf vaſſal to the King of England; for this would be juſtifying the late revolution in every

every point. Making an independent kingdom a fief of another ſovereignty, is not more ſubverſive of the conſtitution, than the meaſures are, which were purſued by James VII. during the whole courſe of his reign. And if the people of Scotland could lawfully judge, that Baliol had ſubverted the conſtitution, and upon that judgement could transfer the crown to another; the people of Britain had the ſame title to give judgement againſt James VII. and to declare that he had forfeited the crown.

With regard to England, the pretext of a divine right is ſtill more lame, if poſſible. William the Conqueror was a baſtard, and could have no divine right to the dukedom of Normandy; nor did he himſelf pretend any other right to the crown of England, than by the teſtament of Edward the Confeſſor. But ſuppoſing him to have conquered England, which will not be admitted, he certainly did not conquer his Norman ſubjects who came over with him to England, and from whom, for ought we know, a great part of the nation are deſcended. The

Stuarts,

Stuarts, therefore, who have no other claim to the crown of England, but by a female connection with the race of William the Conqueror, cannot, with any ſhadow of reaſon, inſiſt upon their beloved doctrine of a divine right, ſo far as concerns the Engliſh who are of Norman extraction.

Upon the whole, ſuppoſing the hereditary right of kings to be the appointment of God, indefeaſible and indiſpenſable, the following points ought to be aſcertained: *1ſt*, Whether this law be univerſal, to take place over the whole earth; or if it be limited to certain nations; and what theſe nations are? *2d*, To what particular families does this divine right belong? *3d*, The rules of ſucceſſion, which concern theſe particular families, ought to be diſtinct and perſpicuous, ſo as to procure a univerſal agreement, as about the primary laws of nature. *4th*, Theſe rules ought to be innate, and the tranſgreſſion of them be attended with the ſtrongeſt ſenſe of immorality, like treachery or murder. Were theſe points thoroughly cleared, the ſyſtem might

might be conſiſtent: but, as it ſtands, it is attended with doubts and darkneſs, to lead every honeſt heart who eſpouſes it, into endleſs perplexities.

Modern hiſtories are filled with evils occaſioned by diſputed ſucceſſions: they are alſo filled with evils occaſioned by conteſts about the king's prerogative. There can be no moderation in ſuch controverſies, where the Almighty is made a party, and every perſon termed *impious* who takes the oppoſite ſide. Hereby it comes, that this doctrine of hereditary indefeaſible right in kings, ſeldom fails to break the peace of ſociety, to foſter inveterate enmities, and to be the ſource of endleſs wars; of which, were there no other evidence, the preſent times afford a deplorable inſtance. Were we to aſſign any parent to this doctrine, other than blind enthuſiaſm, we can never aſcribe it to a good being. And, indeed, the devil himſelf could not more effectually diſtreſs mankind than by propagating ſuch a poiſonous opinion. Plague and famine are nothing to it.

But

But though the doctrine merits no quarter, I would not be ſo ſevere upon its votaries. I am ſenſible, the farther removed any opinion is from truth, the greater, in proportion, is the difficulty of converſion. It is like love to an ugly woman, which is ever in extreme. The Jacobites, ſuch as are not of deſperate fortunes, are in ſome meaſure pardonable, even while they are laying waſte their country by inteſtine commotions. When they venture their lives and fortunes in the ſervice of their idol-prince, it ought to be preſumed, that they are deluded by a miſtaken principle of duty, not intereſt; becauſe their proſpect of ſucceſs can never balance the hazard. What pity it is they were not engaged in a better cauſe? But if nothing elſe will open their eyes, ought it not to have ſome effect, that there is nothing more repugnant to the laws which govern all ſocieties, than for any ſingle man, or ſet of men, to force their opinions upon the majority. How would they reliſh the behaviour of a member of their own parliament, who ſhould endeavour, by force of

of arms, to oblige the whole body to ſubmit to his ſentiment? Or how would they reliſh a body of men riſing in arms, upon no better pretext, than obtaining juſtice to a friend, whom they ſuppoſe to be unjuſtly condemned by the whole body of judges? Is it not an excuſe commonly given by *banditti*, for robbing on the highway, that they are but making repriſals, becauſe of goods unjuſtly wreſted from them by authority of law? Yet this is preciſely the preſent caſe. The late King James was ſet aſide by the ſovereign authority of the nation, that is, by the act of the majority, who, from the very nature of ſociety, muſt be the ultimate judges, in all matters which concern their preſervation and well-being. Perhaps he was unjuſtly condemned. Be it ſo, for argument's ſake. But an ultimate judgement muſt lie ſomewhere, without appeal. It muſt be a fundamental law in all ſocieties, to acquieſce in this ultimate judgement, right or wrong, without which concord cannot be preſerved, even for a moment. No honeſt remedy after this can remain, but to deſert the ſociety, and to join

join ſome other, where the rules of juſtice are ſuppoſed to be better obſerved. Can it be thought, that the right of any man in a ſociety, ſuppoſing him a chief magiſtrate, truſted with the greateſt powers, is ſuperior to the fundamental laws of the ſociety, whence he derives this right? It is an abſurdity, the ſame as, that a part is greater than the whole. It were to be wiſhed, that thoſe gentlemen would ſeriouſly conſider this matter, who are ſo ſtrenuous for the claim of an abdicated king, and who would embroil heaven and earth to compaſs the reſtoration of the family. And would they but allow themſelves to think, with any degree of coolneſs, they would ſoon be convinced, that the peace of ſociety is an object of greater importance than the right of any ſingle man can be, ſuppoſing him deſcend ed from a thouſand kings.

FINIS.